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Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives

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"All that is lacking is a sack of stones for throwing."¹

The struggle for adequate recognition of the human rights of lesbian and gay persons in the United States today faces an aggressively organized opposition that has targeted, in particular, the some 139 jurisdictions in the United States that have enacted laws to protect lesbians, gay men, and bisexuals from various forms of discrimination.² This organized opposition successfully secured the adoption of Colorado Amendment Two, which not only repealed existing state laws that protect gay people from discrimination, but also banned all future laws that would recognize such claims by lesbians and gay men.³ Arguments for constitutional limits on

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¹ *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 659 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

² See Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905 (1993).

³ See COLO. CONST., art. II, § 30b. The full text of article II, § 30b (Amendment Two) is as follows:

such anti-lesbian/gay initiatives have taken a number of forms, including Guarantee Clause objections to their antirepublican character,⁴ objections on grounds of suspect classification analysis under the Equal Protection Clause,⁵ free speech and associational liberty claims under the First Amendment,⁶ and abridgments of the fundamental right of political participation under the Equal Protection Clause.⁷ The last of these arguments was endorsed by the Supreme Court of Colorado in its judgment affirming the lower court's preliminary injunction against enforcement of Colorado Amendment Two.⁸

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. The voters of Colorado approved Amendment Two by a vote of 53.4% to 46.6% on November 3, 1992. On July 19, 1993, the Colorado Supreme Court affirmed the grant of a preliminary injunction against the Amendment. *See Evans v. Romer*, 854 P.2d 1270, 1272 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993). On December 14, 1993, Judge H. Jeffrey Bayless granted a permanent injunction against the Amendment, finding that under the strict scrutiny standard applicable to the constitutional assessment of the Amendment in *Evans*, the state failed to justify the Amendment in terms of compelling state interests. *See Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753, 755-59 (Colo. Dist. Ct. 1993).

⁴ *See* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 20 (1993); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 188-97 (1993).

⁵ *See* Note, *supra* note 2, at 1912-14; Niblock, *supra* note 4, at 167-77.

⁶ *See* Note, *supra* note 2, at 1919-22.

⁷ *See id.* at 1916-18; Niblock, *supra* note 4, at 178-88.

⁸ *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993). Another argument, questioning the constitutionality of these initiatives, is a form of heightened rational basis scrutiny along the lines of *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985) (striking down a zoning law that prohibited mentally retarded individuals from residing in certain parts of town). *See also* Note, *supra* note 2, at 1914-16. Because the force of this argument depends on analogies to already existing suspect classes and fundamental rights, it will be only as strong as those analogies. Accordingly, this Article will not independently explore this argument, but assumes that the interpretive insights afforded by this

This Article argues that the strongest constitutional argument for constitutional limits on anti-lesbian/gay rights initiatives is the one that has been the least explored in the available literature⁹ and the one that all other arguments implicitly depend on for their force: namely, the initiatives in question express, through public law, constitutionally forbidden sectarian religious intolerance against the fundamental rights of conscience, speech, and association of lesbian and gay persons protected by America's first and premier civil liberty, the liberty of conscience.¹⁰ My argument thus critically examines the various current arguments regarding constitutional limits on anti-lesbian/gay rights initiatives. It then constructively suggests the clarifying explanatory and normative power of an alternative perspective on this issue. This perspective focuses on religious intolerance as the first suspect classification under American constitutional law and the principled characterization of anti-lesbian/gay rights initiatives as reflecting this suspect classification. Indeed, my larger claim is that the suspectness of sexual preference rests on the traditional suspectness of religious classifications, in this case, classification based on lesbian and gay personal and moral conscientious identity. If this is a suspect classification, then the initiatives in question run afoul of our historically most robust and most textually explicit constitutional guarantees of the rights of the person. Ironically, the sectarian religious proponents of these initiatives egregiously degrade and abuse the American constitutional traditions of religious liberty that they claim to cherish and protect.¹¹ It is time for Americans to reclaim and reaffirm their central constitutional guarantees of religious toleration and pluralism, the basic rights owed, on terms of principle, to all Americans, including lesbian and gay Americans. Nothing

Article can be usefully transposed to clarify its force. For example, if these initiatives, on analysis, express constitutionally suspect religious intolerance, that fact may clarify the special critical force that heightened rational basis scrutiny has been supposed to have in the case of these initiatives. For development of similar themes, see Niblock, *supra* note 4.

⁹ For example, the *Harvard Law Review* Note dismisses, as "beyond the scope of this Note," a possible Establishment Clause objection to anti-gay-rights initiatives. See Note, *supra* note 2, at 1921. It is not explained why a note entitled *Constitutional Limits on Anti-Gay-Rights Initiatives* fails to consider one of the more powerful constitutional arguments against such initiatives.

¹⁰ See generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); WILLIAM L. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1987).

¹¹ For example, a proposed anti-lesbian/gay initiative in Oregon rested its case on "a Right of Conscience." *deParrie v. Keisling*, 862 P.2d 494, 495 (Or. 1993).

less than the integrity of our constitutionalism is at stake.

I. CURRENT CONSTITUTIONAL ARGUMENTS AGAINST ANTI- LESBIAN/GAY INITIATIVES

All of the important current constitutional arguments against anti-lesbian/gay initiatives implicitly assume and sometimes expressly identify a feature of these initiatives as central to their unconstitutional status: namely, their roots in sectarian religious intolerance.

Hans Linde's important development of a Guarantee Clause objection to these initiatives illustrates the latter point.¹² Linde makes a powerful historical and textual case against the judiciary's failure to interpret the Guarantee Clause in a manner that raises objections to initiatives in general, and he suggests compelling reasons why such arguments should be developed to invalidate initiative lawmaking against the rights of homosexuals.¹³ Linde quite properly underscores Madison's objections to Athenian mass assemblies and the need for a republican alternative that would harness democratic political power, through the delegation of such power to representative, deliberative political bodies, in ways more likely both to respect human rights and advance the public interest.¹⁴ Consistent with the Madisonian political theory of American constitutionalism, Linde argues that initiatives must be condemned as antirepublican when they are

¹² See Linde, *supra* note 4, at 36.

¹³ *Id.*

¹⁴ *Id.* at 23-24. Madison makes this point most clearly in THE FEDERALIST No. 63 in the following terms:

From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients, nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies in the *total exclusion of the people in their collective capacity*, from any share in the *latter*, and not in the *total exclusion of representatives of the people* from the administration of the *former*. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed, that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.

THE FEDERALIST No. 63 (James Madison). See THE FEDERALIST No. 10 (James Madison), for further development of these themes.

functionally most equivalent to the factionalized excesses of the Athenian mass assemblies, and thus he articulates five criteria of such functional equivalence.¹⁵ Four of Linde's criteria focus on the factionalized character of such direct lawmaking and its mobilization of majoritarian factionalized group insularity against the conscientious views of unjustly stigmatized outsiders to dominant groups.¹⁶ Madison, following Jefferson, regarded liberty of conscience as the central inalienable right of free persons,¹⁷ and consistent with this view, Linde frames his criteria of equivalence to identify those forms of political factionalism that most threaten the inalienable right to conscience.¹⁸ However, it is an analytically striking feature of Linde's position that, while his argument expressly assumes this Madisonian framework, he does not focus on the substantive normative considerations that motivate both Madison's and his own argument.

Other constitutional arguments against anti-lesbian/gay initiatives are, if anything, less explicit about the role these substantive normative considerations play in their view of the matter. Yet, on examination, such considerations invariably clarify and strengthen the force such arguments have and should be taken to have.

For example, the claim that initiatives like Colorado Amendment Two unconstitutionally deploy a suspect classification standardly explores judicially accepted suspect classifications like race and gender in terms of features of these classifications (*e.g.*, political powerlessness, salience, and immutability) that are alleged to be analogous to sexual preference.¹⁹ There are important analogies of principle central to the constitutionally suspect nature of race and gender that apply equally to sexual preference. But, for reasons I offer below, these analogies cannot be plausibly understood in terms of political powerlessness, salience, or immutability because none of these features plausibly explain the suspectness of race and gender let alone sexual preference. Emphasis on these analogies not only fails to do justice to the suspectness of race and gender, but it renders problematic the suspectness of sexual preference for reasons (*e.g.*, controversies over its salience and immutability) that should be and are irrelevant.²⁰ We need an

¹⁵ See Linde, *supra* note 4, at 41–43.

¹⁶ See *id.* at 41–42.

¹⁷ For fuller discussion, see DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 173–82 (1989) [hereinafter RICHARDS, FOUNDATIONS]; DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 111–16 (1986) [hereinafter RICHARDS, TOLERATION].

¹⁸ Linde, *supra* note 4, at 41–43.

¹⁹ See Note, *supra* note 2, at 1912–14.

²⁰ For various judicial opinions that have foundered on such false analogies (*i.e.*,

approach to suspect classification analysis not burdened by these false and misleading analogies. The case for the suspectness of sexual preference is stronger than any case yet made on these grounds. We need an approach that can make this case. For that approach, we must look, as I shall later suggest, to the roots of suspect classification analysis in the suspectness of religious classifications.

The argument that anti-lesbian/gay initiatives abridge central free speech rights of homosexuals builds on the important role that traditional guarantees of free speech have played in the protection of speech associated with the development and expression of lesbian and gay public identity in American political and constitutional culture.²¹ In particular, the initiatives are condemned as violations of free speech because the initiatives' constitutional repeal and prohibition of laws forbidding discrimination on grounds of sexual preference intimidate lesbian and gay persons not to assert their rights of free speech to affirm their homosexuality as a public identity. The argument has, as an argument of free speech, limited force applicable to the censorship of speech as such, an argument that some may find strained on the facts. (Colorado Amendment Two, on this view, leaves the regime of free speech quite intact, robustly deployed publicly, as this Article itself shows, in a number of weighty constitutional criticisms of the Amendment.) Its argumentative force would be much more powerfully targeted on Amendment Two if it were not limited to censorship of speech, but included constitutionally suspect religious censorship of the right of conscience itself—in effect, degrading one form of conscientious conviction as less worthy of equal respect than others. Perhaps, as I believe, that is what advocates of this argument implicitly assume. If so, the force of their

denying the suspectness of sexual orientation on such grounds), see *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 570–74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 463–66 (7th Cir. 1989), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1075–76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 101–04 (D.C. Cir. 1987). For an example of a judicial opinion that analytically rebutted these false analogies in a principled, analytically rigorous way and found sexual preference to be a suspect classification, see *Watkins v. United States Army*, 847 F.2d 1329, 1343–44 (9th Cir. 1988), *cert. denied*, 498 U.S. 957 (1990).

²¹ See Note, *supra* note 2, at 1919–22. For the important role of arguments of free speech in the struggle for the rights of lesbian and gay persons, see NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* 1–14 (2d ed. 1992); Jose Gomez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 L. & INEQ. J. 121 (1983); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993).

argument would be both clarified and deepened, as a matter of constitutional principle, if it were explicitly connected (as it usually is not) with the roots of the guarantee of free speech in the freedom of conscience.²² If the argument could be reconceived in this way, it would have force not only in its application to speech as conventionally understood, but also to the issues of freedom of conscience that are, in fact, the central normative considerations at issue. We need a way of thinking about these questions that can clarify these connections and thus strengthen our constitutional arguments.

Finally, the argument that anti-lesbian/gay initiatives abridge fundamental rights of political participation²³ rests on an interpretive generalization from Supreme Court decisions invalidating attempts to restructure politics in ways hostile to racial minorities.²⁴ The principle of these cases is not, on this view, the suspectness of race, but a more general principle that constitutional rights of political participation are abridged when politics is restructured (*e.g.*, by initiatives leading to state constitutional amendments) in ways hostile to any identifiable class. These cases include not only constitutionally recognized suspect classes like racial minorities, but also other groups (like homosexuals) who are not, or at least not yet, a constitutionally recognized suspect class.²⁵ The argument rests on an extrapolation from existing case law that might have force if supported by convincing arguments of democratic political theory regarding the general terms of fair representation: in particular, that such representation forbids all constitutional arrangements that are detrimental to

²² For extended argument to this effect, see RICHARDS, FOUNDATIONS, *supra* note 17, at 172-201; RICHARDS, TOLERATION, *supra* note 17, at 165-87.

²³ See *Evans v. Romer*, 854 P.2d 1270, 1285-86 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993); Note, *supra* note 2, at 1916-18.

²⁴ See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (invalidating state initiative depriving local school districts of power, absent a judicial order, to eliminate racial imbalance through mandatory busing); *Hunter v. Erickson*, 393 U.S. 385 (1969) (invalidating city charter amendment that repealed existing local antidiscrimination ordinances and that required future voter approval of any city ordinance dealing with racial, religious, or ancestral discrimination in housing); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that a facially neutral amendment to the California state constitution, which would have prevented the state from interfering with a person's "absolute" right to sell or rent property to whomever she wanted, constituted constitutionally forbidden discriminatory state action). *But cf.* *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (sustaining California constitutional amendment prohibiting court-ordered busing to alleviate *de facto* segregation).

²⁵ *Cf.* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

any political group. There are, however, no such remotely plausible arguments as a matter of political and constitutional theory. Some political group will be hurt by any constitutional change, a fact which is irrelevant to the normative merits of the change, which turn rather on whether the change, consistent with the political theory of American constitutionalism, either better protects basic rights or channels political power to pursuit of the public interest.²⁶ The argument based on the right of political participation has greater force when it is interpreted, as it has been by both those who have advocated and accepted it, against the background of the rights placed at threat by Colorado Amendment Two.

In general, the argument based on the right of political participation has force when rooted in some deprivation of basic rights, including rights against unjust discrimination. One of the leading cases, which is the basis of the argument for a right of political participation, makes this point quite clear. In *Hunter v. Erickson*,²⁷ an Akron charter amendment passed by voters required that antidiscrimination housing ordinances related to race, religion, or ancestry receive majority voter approval prior to enactment, while other ordinances remained subject to the original rule which required only City Council approval.²⁸ While Akron could decide to require all of its municipal legislation to be approved by plebiscite, the Court held that it could not selectively burden legislation directed against discrimination on the basis of race, religion, or ancestry.²⁹ The Court acknowledged that "the section draws no distinctions among racial and religious groups," and that "Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end."³⁰ Nevertheless, it found the legislation had a discriminatory impact: "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical matter, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."³¹

The interpretation of this doctrine has its real constitutional force not in establishing a general right of all groups as such, but rights of groups more

²⁶ On the political theory of American constitutionalism, see DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) [hereinafter RICHARDS, *CONSCIENCE*]; RICHARDS, *FOUNDATIONS*, *supra* note 17, at 5, 114-48.

²⁷ 393 U.S. 385 (1969).

²⁸ *Id.* at 386.

²⁹ *Id.* at 393.

³⁰ *Id.* at 390.

³¹ *Id.* at 391.

narrowly construed on facts analogous to Colorado Amendment Two: in particular, the roots of such constitutional lawmaking in forms of constitutionally invidious intolerance. Indeed, religious discrimination against one particular group would, under a principled interpretation of *Hunter*, be the rankest form of unconstitutional expression of religious intolerance. It would be as if the *Hunter* initiative did not apply, nondiscriminatorily, to all religious discrimination, but just to religious discrimination against, for example, Jews (an analogy I explore at some length below). The constitutional outrage of Colorado Amendment Two is of this magnitude. An argument is needed to show the outrageousness of the Amendment.

Additionally, an inquiry is needed as to why lesbian and gay advocates have failed to explicitly make an argument that they both clearly believe and must assume as the background for the plausible interpretation of the arguments they do make. Finally, an exploration is required of the constitutional stakes of justice to lesbian and gay persons and of the role of lesbian and gay advocacy in the interpretive integrity of our constitutionalism that rests on arguments of principle that give full and fair expression to the claim of all Americans to protection of their universal human rights.³²

II. AN ALTERNATIVE PERSPECTIVE

Current constitutional arguments attacking anti-lesbian/gay initiatives are less powerful than they can and should be. They cast arguments in terms that fail to deploy powerful constitutional arguments that clarify and strengthen their claims. We need, now, to investigate what these arguments are.

I begin by further exploring my earlier remarks concerning difficulties in current arguments about the suspectness of sexual preference, and then offer my alternative view. We should, I believe, resist various attempts to ground the suspectness of sexual preference on either political powerlessness or the alleged immutability of sexual preference, on analogy to race and gender, and focus rather on the suspectness of the attempt to discriminate against the public claims to justice central to lesbian and gay public and private identity, on analogy to religion.

³² For development of this point, see RICHARDS, FOUNDATIONS, *supra* note 17, at 131-71.

A. Political Powerlessness

A plausible general theory of suspect classification analysis must unify, on grounds of principle, the claims to such analysis of African-Americans, women, and lesbians and gays. Political powerlessness alone cannot do so. Lack of political power—measured either by some statistical norm such as Ackerman's³³ or by Ely's principle of fair representation³⁴—does not capture the plane of rights-based ethical discourse fundamental to suspect classification analysis as it has been developed in authoritative case law. An analysis based solely on political powerlessness wrongly suggests that the gains in political solidarity of groups subjected to deep racial, sexist, or religious prejudice (in virtue of resistance to such prejudice) disentitle them from constitutional protection,³⁵ as if the often meager political gains of blacks, women, and lesbians and gays (when measured against their claims of justice) are the measure of constitutional justice.³⁶ This analysis preposterously denies constitutional protection to women because they are a statistical majority of voters.³⁷ This approach also proves too much: it extends protection to any political group, though subject to no history of rights-denying prejudice, solely because it has not been as politically successful as it might have been (*e.g.*, dentists).³⁸ Procedural models of

³³ See Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

³⁴ See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

³⁵ Ackerman likewise makes this erroneous suggestion. Ackerman, *supra* note 33, at 718, 740-46.

³⁶ Racial classifications, for example, remain as suspect as they have ever been irrespective of the political advances of African-Americans. See, *e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (awarding custody of child on grounds of race of adoptive father held unconstitutional).

³⁷ The Supreme Court has expressly regarded gender as a suspect classification irrespective of the status of women as a political majority. See, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973); *cf.* *Craig v. Boren*, 429 U.S. 190, 204 (1976) (holding that gender classification is not substantially related to traffic laws). *But cf.* ELY, *supra* note 34, at 164-70 (asserting that women should be denied constitutional protection because they constitute a majority of voters and are noninsular).

³⁸ The Supreme Court has declined to regard the mere fact of the greater political success of one interest group over another as relevant to according closer scrutiny to legislation favorable to one group over another. See, *e.g.*, *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-76 (1980); *cf.* *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1965).

suspect classification analysis suppress the underlying substantive rights-based normative judgments central to how equal protection should be and has been interpreted. Such models neither explanatorily fit the case law nor afford a sound normative model with which to criticize the case law.

Suspect classification analysis focuses on the political expression of irrational prejudices of a certain sort: namely, those rooted in a history and culture of unjust exclusion of a certain group from participation in the political community required by their basic rights of conscience, speech, and association. The fundamental wrong of racism and sexism has been the intolerant exclusion of blacks and women from the rights of public culture, exiling them to cultural marginality in supposedly morally inferior realms and unjustly stigmatizing identity on such grounds. Such unjust cultural marginalization and stigmatization also victimize homosexuals, and its rectification entitles sexual preference to be recognized as a suspect classification.³⁹ Indeed, the grounds for the suspectness of sexual preference forthrightly rest on the oldest suspect classification under American public law, religion.

B. Immutability

The fact that sexual preference is not, like race or gender, an immutable and salient personal characteristic has sometimes been taken to disqualify sexual preference from treatment as a suspect classification.⁴⁰ The argument is controversial even on its own empirical and ethical terms.

Sexual preference may be a largely settled and irreversible erotic preference for most people long before the age of responsibility.⁴¹ The

³⁹ I explore the analogies between racism, sexism, and homophobia at greater length in RICHARDS, CONSCIENCE, *supra* note 26, in the context of a general interpretive study of the enduring moral legacy of the Reconstruction Amendments to American constitutionalism—a legacy, in my judgment, properly claimed today as a matter of principle by lesbian and gay persons. This Article further develops, refines, and elaborates themes from this work.

⁴⁰ See, e.g., Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1066–67 (1979).

⁴¹ On irreversibility, see WAINWRIGHT CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 283–91 (1967); MICHAEL RUSE, *HOMOSEXUALITY* 59–62 (1988). On the early age of its formation, see JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 153–201 (1972); C.A. TRIPP, *THE HOMOSEXUAL MATRIX* 251 (1975); DONALD J. WEST, *HOMOSEXUALITY* 266 (1986). One study hypothesizes that gender identity and sexual object choice coincide with the development of language, between the age of 18 to 24 months. John Money et al., *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHNS

possible concealment or even repression of the preference—as a reason for disqualifying it from treatment as a suspect classification—is not a reasonable condition of political respect if sexual preference is integral to the authenticity of moral personality and the prejudice against it is as politically unreasonable as racism and sexism. In fact, as is more fully argued below, sexual preference is central to self-authenticating claims to lesbian and gay personal and ethical identity, and the prejudice against such claims is politically unreasonable in the same way racism and sexism are unreasonable. The sacrifice of moral authenticity is not a demand any person could reasonably be asked to accept as the price for freedom from irrational prejudice; and homosexual persons can no more be reasonably asked to make such a crippling sacrifice of self than any other person.

In fact, immutability and salience do not coherently explain even the historical paradigm of suspect classification of race, and therefore cannot normatively define the terms of principle reasonably applicable to other claims to suspect classification analysis. The principle of *Brown v. Board of Education*⁴² itself cannot reasonably be understood in terms of the abstract ethical ideal that state benefits and burdens should never turn on an immutable and salient characteristic as such. Many examples show that this proposition is not a reasonable ideal or principle.⁴³ Disabled persons are born with disabilities that often cannot be changed; nonetheless, people with such disabilities are certainly owed, on grounds of justice, a distinctive measure of concern aimed to accord them some fair approximation of the opportunities of nondisabled persons. It is no moral objection to such measures that they turn on immutable characteristics because the larger theory of distributive justice has identified such factors as reasonably relevant to its concerns.

The example is not an isolated one; its principle pervades the justice of rewards and of fair distribution more generally. For example, we reward certain athletic achievements very highly and do not finely calibrate the components of our rewards attributable to acts of self-disciplined will from those based on natural endowments. Achievement itself suffices to elicit reward even though some significant part of it turns on immutable physical endowments that some have and others lack. Or, we allocate scarce places in institutions of higher learning on the basis of an immutable factor such as geographic distribution, an educational policy we properly regard as

HOPKINS HOSP. 301, 308–10 (1955); cf. ALAN P. BELL ET AL., *SEXUAL PREFERENCE* (1978). For a recent judicious review of the relevant scientific literature, see RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 62–86 (1992).

⁴² 347 U.S. 483 (1954).

⁴³ For a similar analysis, see RONALD DWORKIN, *LAW'S EMPIRE* 381–99 (1986).

sensible and not unfair. The point can be reasonably generalized to conclude that part of the theory of distributive justice is concerned with both maintaining an economic and social minimum and some structure of differential rewards to elicit better performance for the public good. The idea of a just minimum turns on certain facts about levels of subsistence, not on acts of will; we would not regard such a minimum as any the less justly due if some component of it turned on immutable factors. Differential rewards perform the role of incentives for the kind of performance required by modern industrial market economies such as the economies of the United States and Western Europe; immutable factors such as genetic endowment may play some significant role in such performance. Nonetheless, we do not regard it as unjust to reward such performance so long as the incentives work out with the consequences specified by our theory of distributive justice. Our conclusion, from a wide range of diverse examples, must be that immutability and salience do not identify an ethically reasonable principle of suspect classification analysis.

Race is a suspect classification, not on these grounds, but when it expresses a rights-denying culture of irrational political prejudice. Persons are not regarded as victimized by this prejudice because they are physically unable to change or to mask the trait defining the class, but because the prejudice itself assigns intrinsically unreasonable weight to and burdens on identifications central to moral personality. Race in America is culturally defined by the "one-drop" rule under which quite small proportions of black genes suffice to be regarded as black, including persons who are for all visibly salient purposes nonblack.⁴⁴ Persons who are black by this definition could pass as white; most, including some historically important African-American leaders, choose not to do so.⁴⁵ Choosing to pass as white would cut them off from intimately personal relationships to family and community that nurture and sustain self-respect and personal integrity;⁴⁶ the price of avoiding racial prejudice is an unreasonable sacrifice of basic resources of personal and ethical identity that they will not accept. In effect, one is to avoid injustice by a denial of one's moral powers to protest injustice, degrading moral integrity into silent complicity with evil. The same terms of cultural degradation apply to all victims of racism whether visibly or nonvisibly black, the demand of supine acceptance of an identity unjustly devalued.

Racial prejudice is an invidious political evil precisely because it is

⁴⁴ See generally F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* (1991).

⁴⁵ *Id.* at 7, 56-57, 77-78, 178-79.

⁴⁶ *Id.* at 56-57.

directed against central aspects of a person's cultural and moral identity on irrationalist grounds of subjugation in virtue of that identity. The central point is not that its irrationalist object is some brute fact that cannot be changed, but that it is based on a central feature of moral personality: in particular, "the way people think, feel, and believe, not how they look"—the identifications that make them "members of the black ethnic community."⁴⁷ Racial prejudice, thus analyzed, shares common features with certain forms of religious intolerance. In particular, racism and anti-Semitism share a common irrationalist fear: *invisible blackness* or the *secret Jew*, persons who can pass as white or Christian but who are allegedly tainted by some fundamental incapacity to fully identify themselves as authentically a member of the majoritarian race or religion.⁴⁸ Such incapacity is ascribed to persons on the basis of "perceived attitudes and social participation rather than on . . . appearance or lineage."⁴⁹ In effect, any dissent from the dominant racist or anti-Semitic orthodoxy, let alone sympathetic association with the stigmatized minority, is interpreted as evidence of being a member of the defective minority, thus imposing a reign of intellectual terror on any morally independent criticism of racial or religious intolerance and encouraging a stigmatized minority to accept the legitimacy of subordination.⁵⁰ The structural resemblance of racism to a form of religious intolerance is an important feature of its American historical background and is fundamental to a sound interpretation of the suspectness of race under American constitutional law.

The interpretive status of race, as the paradigm interpretive case of a suspect classification under the American constitutional law of the Equal Protection Clause, arose against the background of the interdependent institutions of American slavery and racism and the persistence of racism, supported by its constitutional legitimation in cases like *Plessy v. Ferguson*,⁵¹ long after the formal abolition of slavery. Racist institutions, like race-based slavery and its legacy of American apartheid,⁵² importantly evolved from an unjust and constitutionally illegitimate religious intolerance against African-Americans held in slavery. Racist prejudice was

⁴⁷ *Id.* at 179.

⁴⁸ *Id.* at 55–56, 145.

⁴⁹ *Id.* at 145.

⁵⁰ For exploration of anti-Semitism, see MICHAEL LERNER, *THE SOCIALISM OF FOOLS: ANTI-SEMITISM ON THE LEFT* (1992).

⁵¹ 163 U.S. 537 (1896).

⁵² For a recent important study of the persistence of this injustice, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

thus, in its origins, an instance of religious discrimination. This discrimination later developed, in ideological support of the institution of American slavery, into a systematically unjust cultural intolerance of African-Americans as an ethnic group, reflected in their degradation from the status of bearers of human rights such as the basic rights of conscience, speech, intimate association, and work.⁵³ Race is constitutionally suspect when and to the extent public law expresses such unjust racial prejudice, reflecting the unjust cultural degradation of a class of persons from their status as bearers of basic human rights.⁵⁴ The evil of such prejudice is its systematic degradation of identifications central to free moral personality, including powers to protest injustice in the name and voice of one's human rights.

The suspectness of gender,⁵⁵ ethnicity,⁵⁶ alienage,⁵⁷ or illegitimacy⁵⁸ also cannot be plausibly understood in terms of some physical immutability. People not only can have operations to change their sex, but can and have successfully passed as members of the opposite gender.⁵⁹ Latinos can pass as Anglos, aliens can become citizens, and the status of illegitimate children can be changed. The suspectness of the underlying prejudice in each case is its irrationalist interpretation of central aspects of human personality and the unjust degradation of the culture with which a person reasonably identifies.⁶⁰

From this perspective, the issue of the immutability of sexual preference should be irrelevant to its constitutional examination as a suspect classification, and the issue of irrational political prejudice, which

⁵³ I develop this argument at greater length in RICHARDS, CONSCIENCE, *supra* note 26, at 80–89, 150–70.

⁵⁴ For further development of this argument, see *id.* at 170–77.

⁵⁵ See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

⁵⁶ See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 478–79 (1954).

⁵⁷ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

⁵⁸ See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

⁵⁹ See, e.g., LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 42–43 (1991) [hereinafter FADERMAN, *ODD GIRLS*]; LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN: ROMANTIC FRIENDSHIP AND LOVE BETWEEN WOMEN FROM THE RENAISSANCE TO THE PRESENT* 292 (1981) [hereinafter FADERMAN, *SURPASSING*].

⁶⁰ The suspectness of gender, in particular, reflects a history of unjust degradation and resulting irrationalist prejudice, which account for when and why gender is constitutionally suspect. For further development of this argument, see RICHARDS, CONSCIENCE, *supra* note 26, at 178–91.

does not turn on salience, should be central to the analysis. In particular, a central theme of this examination should be the unreasonable weight and burden such prejudice places on cultural identifications central to moral personality. The insistence on immutability and salience as requirements for suspect classification analysis in the case of sexual preference is unprincipled. It is not a requirement we impose elsewhere, and there is no good argument of principle why we should impose it here.⁶¹

It is particularly paradoxical to hold only sexual preference to these requirements when the underlying irrationalist prejudice, homophobia, transparently expresses the very origins of suspect classification analysis in the first suspect classification under American public law, religion. Such religious intolerance in its nature is directed at a disfavored religious or, more broadly, conscientiously-based dissenting identity, both placing burdens on conscientious exercise of religion and putting pressure on dissenting conscience to change identity in line with majoritarian orthodoxy. Such intolerance focuses, more transparently than racism or sexism, on the malleabilities of conscientious identity and thus can even less plausibly be regarded as rooted in immutable physical facts. This illustrates the paradoxicality of holding religiously-based intolerance of sexual preference to this requirement. If political homophobia is, on examination, a constitutionally illegitimate expression of religious intolerance, public laws reflecting this prejudice should be forthrightly constitutionally suspect on the clearest textual and historical constitutional grounds: the central American constitutional tradition of religious toleration under the religion clauses of the First Amendment that suspect classification analysis under the Equal Protection Clause of the Fourteenth Amendment assumes and elaborates, and certainly does not repeal or retrench.

Against this background, there are good reasons why lesbian and gay persons might and should resist interpreting their claims to suspect classification analysis in the biological and genetic terms that some gay scientists have recently proposed.⁶² To claim a mode of argument not

⁶¹ Cf. *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1988), cert. denied, 498 U.S. 957 (1990) (considering immutability as a factor in equal protection analysis); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1302-03 (1985).

⁶² For further developments of this skeptical theme, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Edward Stein, *The Relevance of Scientific Research about Sexual Orientation to Lesbian and Gay Rights*, 27 J. OF HOMOSEXUALITY (forthcoming 1994).

required for other claimants to suspect classification analysis ethically undercuts the integrity of the arguments of principle that lesbians and gays may, can, and should make as arguments available on fair terms to all persons. It also falsely and malignantly reduces to biological terms what is essentially a principled argument for the just and ethical emancipation of the moral powers of conscience of lesbian and gay persons in terms that subvert its emancipatory potential. Biological reductionism was central to the unjust cultural subjugation of African-Americans and women as a separate species,⁶³ and will wreak comparable havoc on lesbians and gay men today by confirming, rather than challenging, the unjust cultural stereotypes of an inferiority rooted in nature (in this case, biology). The repetition of the terms of our subjugation is not needed, but an empowering critical perspective on the cultural terms of our degradation and on our corresponding political, ethical, and intellectual responsibilities to exercise our active moral powers of criticism and reconstruction of that culture on terms of justice is required.⁶⁴ Lesbians and gays need responsibly to insist on and to demand our personal and moral identity as lesbian and gay persons, and to resist those unjust and objectifying stereotypes that have stripped us of our powers of free moral personality.

The contemporary constitutional issue of principle precisely highlights the devastating impact on the basic rights of lesbian and gay people of a heretofore unchallenged hegemonic, homophobic religio-cultural orthodoxy. This orthodoxy has stunted and stultified the range of human and moral intelligence and imagination—the basic resources of conscience—that lesbian and gay persons, as individuals, may reasonably bring to the diverse patterns of a well-lived and ethical life. This orthodoxy also today self-consciously and aggressively wars against the ethical empowerment of lesbian and gay persons to protest its injustice. We need an interpretation of suspect classification analysis adequate to our indignation at the force this unjust culture has uncritically enjoyed and plainly continues to enjoy. The clear constitutional objection to unjust religious persecution is, I believe, the ground for our indignation.

⁶³ See STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1981); CAROL TAVRIS, *THE MISMEASURE OF WOMAN* (1992).

⁶⁴ For exploration of this issue from the perspective of the responsibilities of the American law school, see David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 45 *STAN. L. REV.* 1955 (1993).

C. Sexual Preference as a Suspect Religious Classification

The most illuminating constitutional analogy for the suspectness of sexual preference today is neither race nor gender, but the oldest suspect classification under American public law, religion.⁶⁵ The constitutional protection of religion never turned on its putative immutable and salient character (people can and do convert, and can and do conceal their religious convictions), but on the traditional place of religion in the conscientious and reasonable formation of one's moral identity in public and private life and the need for protection, consistent with respect for the inalienable right of conscience, of persons against state impositions of sectarian religious views. In particular, the identifications central to one's self-respect as a person of conscience are not to be subject to sectarian impositions through public law that unreasonably burden the exercise of one's conscientious convictions (the free exercise principle)⁶⁶ or encourage change of such convictions to sectarian orthodoxy (the antiestablishment principle).⁶⁷ Normative claims by lesbian and gay persons today have exactly the same ethical and constitutional force: they are in their nature claims to a self-respecting personal and moral identity in public and private life through which they may reasonably express and realize their ethical convictions of the moral powers of love and friendship in a good, fulfilled, and responsible life against the background of an unjust and now quite conspicuously sectarian tradition of moral subjugation.⁶⁸ Correspondingly, the political reaction to such claims, as reflected in Colorado Amendment Two, is precisely based on sectarian religious objection to the conscientious claims of justice made by and on behalf of lesbian and gay identity as a form of conscience that is entitled to equal respect under fundamental American guarantees of freedom of conscience. At bottom, the point is that the very fact of lesbian and gay identity, precisely in virtue of its conscientious claims to justice, is as unworthy of respect as a traditionally despised religion like Judaism; the practice of that form of conscience may thus be abridged, and certainly persons may be encouraged

⁶⁵ See RICHARDS, FOUNDATIONS, *supra* note 17, at 260, 280.

⁶⁶ For fuller discussion, see RICHARDS, TOLERATION, *supra* note 17, at 140-46.

⁶⁷ *Id.* at 146-62.

⁶⁸ I develop this theme of moral subjugation as a form of moral slavery (relevant to claims of African-Americans, women, and lesbians and gays) in David A.J. Richards, *Public Reason and Abolitionist Dissent*, 9 CHI.-KENT L. REV. 787 (1994). For a related argument similar to the one I offer here, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

to convert from its demands or, at least, be supinely and ashamedly silent. This is the very pith and substance of constitutionally illegitimate religious intolerance which has no proper place under the letter and spirit of American constitutionalism. Sexual preference should be a suspect classification on the most traditional and conservative readings of American constitutional principles: namely, on the ground that it has been and is the object of unjust sectarian religious intolerance against the essential and inalienable human right of conscience. Lesbian and gay persons have as much right to make claims on the basis of such principles as any persons and citizens in America. It is time that they reclaimed America's traditions of toleration from the bigoted, religious sectarians of the right who have so degraded and abused them.

The essential points of the suspect classification analysis of sexual preference are: (1) a history and culture of unjust moral subjugation of homosexuals, (2) the political legitimization of such subjugation by the exclusion of homosexuals from the constitutional community of equal rights in the unreasonable way that gives rise to intolerance and the irrational political prejudice of homophobia, and (3) the sectarian religious expression of such prejudice against the conscientious claims of lesbian and gay persons to justice in public and private life.

The history and culture of the moral subjugation of homosexuals are ancient. In *The Laws*, Plato gave influential expression to the moral condemnation in terms of two arguments: its nonprocreative character, and, in its male homosexual forms, its degradation of the passive male partner to the status of a woman.⁶⁹ Homosexuality was, on this view, an immoral and unnatural abuse of the proper human function of sexuality, marking the homosexual as subhuman and therefore wholly outside the moral community of persons.⁷⁰ The exile of homosexuals from any just claim on moral community was given expression by the striking moral idea of homosexuality as unspeakable. It was, in Blackstone's terms, "a crime not fit to be named; *peccatum illud horribile, inter christianos non nominandum*"⁷¹—not mentionable, let alone discussed or assessed. Such total silencing of any reasonable discussion rendered homosexuality into a

⁶⁹ See 8 PLATO, LAWS *835d–42a. On the moral condemnation of the passive role in homosexuality in both Greek and early Christian moral thought, see PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* 30, 382–83 (1988).

⁷⁰ Consistent with this view, Kant thus claims that homosexuality dishonors humanity and degrades the individual "below the level of the animals" IMMANUEL KANT, *LECTURES ON ETHICS* 170 (Louis Infield trans., 1979) (1930).

⁷¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *215.

kind of cultural death, naturally thus understood and indeed condemned as a kind of ultimate heresy against essential moral values.⁷²

The traditional moral condemnation of homosexuality was, in its historical nature, a form of intolerance that should have been subject to appropriate political and constitutional assessment in light of the argument for toleration.⁷³ However, liberal political theory, as in the related area of gender,⁷⁴ not only failed reasonably to extend its analysis to sexual preference, it indulged irrationalist intolerance by accepting an unreasonable conception of constitutional community which excludes homosexuals as subhuman and unworthy of the rights of conscience, free speech, and association central to the exercise of their moral powers.⁷⁵ The same defective political epistemology of gender and sexuality that unleashed the longstanding cultural intolerance against women⁷⁶ applied, a fortiori, to homosexuals, a group whose sexuality was, because morally unspeakable, even less well understood, fairly discussed, or empirically assessed. The vacuum of fair discussion and assessment was filled by the fears and irrationalist stereotypes reflective of the long moral tradition that exiled homosexuals from moral community.

It is consistent with this argument about homophobia as a culturally constructed irrational prejudice—an insult to culture-creating rights—to observe the extraordinarily important role homosexuals have played in the construction of Western culture, including its arts.⁷⁷ An argument of essential human rights is not directed at saints, heroes, or persons of genius, who can find creative redemption in circumstances that crush the moral powers of other people. The cultural tradition of the West may honor its women and men of genius who are homosexuals, but not as homosexuals and not homosexuals as such. The bitter, plain truth is that ordinary people of good will, whose sexual preference was homosexual, could find in their culture only their denial as unspeakable, voiceless, dead.

⁷² For further discussion of this point, see RICHARDS, *TOLERATION*, *supra* note 17, at 278–79. For a useful historical overview on the social construction of homosexuality, see DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* (1988).

⁷³ For further elaboration of this argument and its implications for American constitutional law, see RICHARDS, *CONSCIENCE*, *supra* note 26; RICHARDS, *FOUNDATIONS*, *supra* note 17; RICHARDS, *TOLERATION*, *supra* note 17.

⁷⁴ For fuller development of this point, see RICHARDS, *CONSCIENCE*, *supra* note 26, at 178–91.

⁷⁵ For relevant historical background, see DAVID A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 78–82 (1977).

⁷⁶ For fuller elaboration, see RICHARDS, *CONSCIENCE*, *supra* note 26, at 178–91.

⁷⁷ See generally *ENCYCLOPEDIA OF HOMOSEXUALITY* (Wayne R. Dynes ed., 1990).

The persisting political force of irrationalist homophobia, as an independent political evil, is quite apparent today when persons feel free to indulge their prejudices against homosexuals, as reflected in Colorado Amendment Two, although neither of the two traditional moral reasons for condemning homosexuality can any longer be legitimately and indeed constitutionally imposed on society at large.

One such moral reason—the condemnation of nonprocreational sex—can no longer constitutionally justify, for example, laws against the sale to and use of contraceptives by married and unmarried heterosexual couples.⁷⁸ The mandatory enforcement at large of the procreational model of sexuality is, in circumstances of overpopulation and declining infant and adult mortality, a sectarian religious ideal lacking adequate secular basis in the general goods that can alone reasonably justify state power. Accordingly, contraceptive-using heterosexuals have the constitutional right to decide when and whether their sexual lives shall be pursued to procreate or as an independent expression of mutual love, affection, and companionship.⁷⁹

The other moral reason for condemning homosexual sex—the degradation of a man to the passive status of a woman—rests on the sexist premise of the degraded nature of women. That premise has been properly rejected as a reasonable basis for laws or policies on grounds of suspect classification analysis.⁸⁰

Nonetheless, although each moral ground for the condemnation of homosexuality has been independently rejected as a reasonable justification for coercive laws enforceable on society at large, they unreasonably retain their force when brought into specific relationship to the claims of homosexuals for equal justice under constitutional law. It is precisely such claims that are distorted by sectarian viewpoints into claims for special rights⁸¹ and are indeed aggressively attacked on such sectarian grounds, as

⁷⁸ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁹ For further discussion, see RICHARDS, *TOLERATION*, *supra* note 17, at 256–61.

⁸⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁸¹ The rhetoric of “special rights” has been conspicuously used in support of anti-lesbian/gay initiatives and referenda, blatantly mischaracterizing a principled claim of persons to be free of invidious discrimination that is no more a claim to special consideration than any other claim (for example, by African-Americans and women) to be protected from such discrimination. The distorting characterization has been noted by several courts in refusing to allow proposed lawmaking to include such a description of antidiscrimination laws. See, e.g., *Faiveas v. Municipality of Anchorage*, 860 P.2d 1214, 1218 (Alaska 1993) (holding referendum petition to repeal

I more fully show below, thus unconstitutionally expressing sectarian religious intolerance through public law.

These claims are today, in their basic nature, arguments of principle made by homosexuals for the same respect for their intimate love life, free of unreasonable procreational and sexist requirements, that is now rather generously accorded heterosexual couples. Empirical issues relating to sexuality and gender are now subjected to more impartial critical assessment than they were previously, and the resulting light of public reason about issues of sexuality and gender should be available to all persons on fair terms. However, such a claim for fair treatment, an argument of basic constitutional principle if any argument is, was contemptuously dismissed by a majority of the Supreme Court of the United States in *Bowers v. Hardwick*.⁸²

Traditional moral arguments, now clearly reasonably rejected in their application to heterosexuals, were uncritically applied to a group much more exigently in need of constitutional protection on grounds of principle.⁸³ Reasonable advances in the public understanding of sexuality and gender, now constitutionally available to all heterosexuals, were suspended in favor of an appeal to the sexual mythology of the Middle Ages.⁸⁴ The transparently unprincipled character of *Bowers* confirms the unjust continuing complicity of American constitutionalism with the legitimization of the cultural construction of the morally subjugated status of

"special homosexual ordinance" does not fairly characterize ordinance which it proposes to repeal); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 661 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992) (holding proposed initiative, including notice of intent to circulate petition that described antidiscrimination legislation as conferring special rights, to be fraud on electorate); *cf. Mabon v. Keisling*, 856 P.2d 1023, 1024 (Or. 1993) (modifying initiative to strike reference to removing homosexuality as minority status subject to special classifications).

⁸² 478 U.S. 186 (1986).

⁸³ For further criticism, see RICHARDS, FOUNDATIONS, *supra* note 17, at 209-47.

⁸⁴ Justice Blackmun put the point acidly:

Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Bowers, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

homosexuals. If the *Plessy*⁸⁵ court illegitimately fostered the construction of American racism, the *Bowers* court has illegitimately advanced the construction of homophobia.

The issue in *Bowers*, the illegitimate criminalization of homosexual sex acts, is not the same issue as suspect classification analysis. Not all acts that should enjoy protection by the constitutional right to privacy would also call for suspect classification analysis; contraceptive-using heterosexual adults, who enjoy and should enjoy protection by the constitutional right to privacy, are not reasonably understood as a suspect class. And the scope of protection of groups properly regarded as suspect classes cannot be limited to the right to privacy or indeed to any fundamental right; protection extends to all laws or policies actuated by irrational prejudice. Correspondingly, the issue of sexual preference, as a suspect classification, is much larger than the issue of *Bowers*. *Bowers* is an interpretive mistake as an analysis of the constitutional right to privacy.⁸⁶ But even if *Bowers* had been rightly decided as a matter of permissible criminalization, it is settled law that a logical and normative space exists for making and indeed sustaining independent equal protection arguments. Neither the Supreme Court's opinion in *Eisenstadt v. Baird*,⁸⁷ extending the right to contraceptives beyond married couples, nor *Carey v. Population Services International*,⁸⁸ further extending the right to minors, requires the premise that the state could not criminalize the sex acts in question. Even if the state could properly criminalize unmarried or underage sex, the distinctions drawn in *Eisenstadt*, between married and unmarried, and in *Carey*, between adult and minor, could and would properly be struck down as unreasonable as a matter of equal protection law in relation to contraception.⁸⁹ Equal protection and privacy analysis

⁸⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁶ I develop this argument at greater length in RICHARDS, FOUNDATIONS, *supra* note 17, at 202-47, and in David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986). See also Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick"*, 79 VA. L. REV. 1781 (1993); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993).

⁸⁷ 405 U.S. 438 (1972).

⁸⁸ 431 U.S. 678 (1977).

⁸⁹ *Accord Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding unconstitutional

overlap, but are not coextensive. In particular, the suspectness of sexual preference under the Equal Protection Clause rests on independent grounds.⁹⁰

The moral insult of homophobia, like that of racism and sexism, cannot be limited to any particular right, but to the denigration of one's status as a bearer of rights within the moral community of equal rights, in particular, conscientious personal and moral identity as a lesbian or gay person. Suspect classification analysis arose from the study of the radical political evil of a political culture, ostensibly committed to toleration on the basis of universal human rights, that unjustly denied a class of persons the cultural space in the political community that is their inalienable human right as persons with moral powers. Liberal political culture, consistent with respect for this basic right, must extend to all persons the cultural resources that enable them critically to explore, define, express, and revise the identifications central to free moral personality.⁹¹ The constitutional evil condemned by suspect classification analysis is the systematic deprivation of this basic right to a group of persons, unjustly degraded from their status as persons entitled to respect for the reasonable exercise of their free moral powers in the identifications central to an ethical life based on mutual respect. To deny such a group, already the subject of a long history and culture of moral degradation, their culture-creating rights is to silence in them the very voice of their moral freedom, rendering unspoken and unspeakable the sentiments, experience, and reason that authenticate the moral personality that a political culture of human rights owes each and every person—including, as we saw earlier, their moral powers to know and claim their basic rights and to protest injustice on such grounds. Sexual preference is a suspect classification because homosexuals are today victimized by irrational political prejudices rooted in this radical political evil which denies them the cultural resources of free moral personality, in particular, the inalienable human right of conscience.

Such political prejudice is an evil, subject to suspect classification analysis, regardless of the form of erotic and emotional life in which a

compulsory sterilization after a third conviction for a felony involving "moral turpitude," excluding such felonies as embezzlement). *Skinner* stands for the proposition that a white collar/blue collar distinction is constitutionally unreasonable under equal protection principles, even if the state could require sterilization under a more reasonable, even-handed program.

⁹⁰ For a related development of this analysis, see Halley, *supra* note 68.

⁹¹ For development of this theme, see WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 162-78 (1989); Yael TAMIR, *LIBERAL NATIONALISM* 13-56 (1993).

homosexual finds fulfillment.⁹² There is as great a variety and range in the erotic intimacy and personal relations of homosexuals as there is of heterosexuals. It includes not only the sodomy obsessively focused on in *Bowers v. Hardwick*,⁹³ but various other sex acts and indeed all forms of erotic intimacy like holding, caressing, kissing and touching, and the other manifoldly variegated playful expressions of human love, most of which could not reasonably be supposed to be governed by *Bowers* (could a caress of one's same-sex beloved in the privacy of one's home be constitutionally condemned as criminal, and privacy retain any shred of dignity as a central constitutional value of free people?). Indeed, homosexual erotic life may be embedded in complex, symbolically elaborated, and idealized forms of intense, deeply loving relationships in which sex acts as such are not in play, but the tender humane mutualities of nurture, transparent understanding, play, concern, and commitment that arise from a common sensibility and imaginative life, conscientious way of thinking and feeling, and shared experience. What is decisively in play in American life today is the claim for self-respecting public and private identity as lesbian and gay persons, in particular, the right to a life and culture, reflecting and expressing one's moral powers, on terms free of a rights-denying political irrationalism that would aggressively silence minds and hearts competent to understand, feel, and protest rank injustice both in public and private life callously done them by sectarian religious bigots. The political prejudice of homophobia remains the same evil of radical cultural intolerance, whatever the sex life in question or not in question, because it denies the cultural space through which persons of homosexual preference may reasonably define and identify themselves with a life of personal and ethical self-respect on whatever terms best give expression to their free moral powers. The suspectness of sexual preference arises precisely from the target of irrationalist homophobia on the claim of lesbian and gay identity to the right of conscience, and should be constitutionally condemned for this reason.⁹⁴

⁹² See generally Halley, *supra* note 68.

⁹³ 478 U.S. 186 (1986).

⁹⁴ For an argument along these lines, albeit not claiming to address the status of sexual preference as a full suspect classification, see *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993) (Mikva, J.), *reh'g en banc granted and judgment vacated*, (Jan. 7, 1994). *Steffan* is distinguishable from predecessor appellate court decisions in one striking respect. In *Steffan*, the discharged service member did not admit to, nor did the Navy claim, any improper—specifically, homosexual—conduct on his part. For earlier cases, see, for example, *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 103 (1990); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir.

Another way of making the same point is to observe that homophobic prejudice, like racism and sexism, unjustly distorts the idea of human rights applicable to both public and private life. The political evil of racism expressed itself in a contemptuous interpretation of black family life which was enforced by antimiscegenation laws that confined blacks, as a separate species, to an inferior sphere.⁹⁵ The political evil of sexism expressed itself in a morally degraded interpretation of private life in which women, as morally inferior, were confined as, in effect, a different species.⁹⁶ In similar fashion, the evil of homophobic prejudice is its degradation of homosexual love to the unspeakably private and secretive, not only politically and socially, but also intrapsychically in the person whose sexuality is homosexual. The intellectual reign of terror—that we earlier saw aims to impose racism and anti-Semitism on the larger society, even on these stigmatized minorities themselves—aims to enforce homophobia at large and self-hating homophobia in particular on homosexuals as well. Its vehicle is the degradation of lesbian and gay identity as a devalued form of conscience with which no one, under pain of ascribed membership in such a devalued species, can or should identify. Such degradation constructs not, as in the case of gender, merely a morally inferior sphere, but an unspeakably and inhumanly evil sphere—a culturally constructed and imagined diabolic hell to which lesbians and gays must be compulsively exiled on the same irrationalist mythological terms by which societies we condemn as primitive exiled devils, witches, and werewolves.⁹⁷ Lesbians and gays are thus culturally defined as a nonhuman or inhuman species whose moral interests in love and friendship and nurturing care are, in their nature, radically discontinuous with anything recognizably human. The culture of such degradation is pervasive and deep, legitimating the uncritically irrationalist outrage at the very idea of lesbian and gay marriage,⁹⁸ which unjustly constructs the inhumanity of homosexual

1984); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984). For one opinion that ruled on homosexual status, not alleged or admitted misconduct, and relied on the military reasoning rejected by Judge Mikva as constitutionally defective, see *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom. Ben-Shalom v. Stone*, 494 U.S. 1004 (1990).

⁹⁵ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding antimiscegenation laws to be unconstitutional expression of racial prejudice).

⁹⁶ See FADERMAN, *SURPASSING*, *supra* note 59, at 85–86, 157–58, 181, 236.

⁹⁷ On the imaginative processes that sustain such a sphere, see generally ALAN E. BERNSTEIN, *THE FORMATION OF HELL: DEATH AND RETRIBUTION IN THE ANCIENT AND EARLY CHRISTIAN WORLDS* (1993).

⁹⁸ For a powerful argument for same-sex marriages as a matter of constitutional justice, see Mark Strasser, *Family, Definitions, and the Constitution: On the*

identity on the basis of exactly the same kind of viciously circular cultural degradation unjustly imposed on African-Americans through antimiscegenation laws.⁹⁹ Groups, thus marked off as ineligible for the central institutions of intimate life and cultural transmission, are deemed subculturally nonhuman or inhuman, an alien species incapable of the humane forms of culture that express and sustain our inexhaustibly varied search, as free moral persons, for enduring personal and ethical meaning and value in living.

The political evil of this prejudice, based on the compulsory secrecy of the preference, is not always ameliorated and may indeed sometimes be aggravated by the growing practice of either not enforcing or repealing or otherwise invalidating criminal laws against homosexual sex. Such developments—without comparable antidiscrimination guarantees against homophobic prejudice—legitimate the ancient idea of something unspeakably and properly private, something all the more outrageous if given any public expression whatsoever (thus, legitimating sexist violence against forms of public expression of homosexual preference).¹⁰⁰ But such compulsory privatization insults homosexuals in the same way it traditionally insulted African-Americans and women. It deprives them as moral persons of their right to speak, feel, and live as whole persons on the terms of public and private life best expressive of their free moral powers. This freedom is the moral right of every person in a free society and lesbian and gay persons have a right to it on equal terms.

It is for this reason that, in my judgment, appropriate constitutional remedies for homophobic prejudice include the range of remedies appropriate in the case of race and gender. I include among these remedies, in contrast to some commentators,¹⁰¹ affirmative action because the underlying constitutional concern should be the reasonable deconstruction of the compulsory privatization of homosexual preference. Homosexuals

Antimiscegenation Analogy, 25 SUFFOLK U. L. REV. 981 (1991); see also Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (finding strict scrutiny analysis to be applicable and holding denial of marriage license to same-sex couple to be violative of the Hawaii constitutional guarantee of equal protection). For historical background on unions regarded as analogous to modern claims for same-sex marriage, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

⁹⁹ For eloquent development of this point, see Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).

¹⁰⁰ Cf. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

¹⁰¹ See RUSE, *supra* note 41, at 265–67. For a good general treatment of the need for antidiscrimination protections for homosexuals, see RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 137–211 (1988).

cannot justly be required to be secretive as the condition of fair access to public goods. To the extent they are so required, they suffer unjust discrimination on grounds of sectarian religious prejudice. Such prejudice can, as in the case of race and gender, be appropriately remedied by appropriate affirmative action plans that both insure that the qualifications of public homosexuals are fairly assessed and that the presence of such homosexuals in various positions challenges and undermines political prejudice in society at large.

As my earlier analysis of the basis of the Western condemnation of homosexuality suggests, homophobia may be reasonably understood today as a persisting form of residual and quite unjust gender discrimination.¹⁰² The nonprocreative character of homosexual sexuality may be of relatively little concern, but its cultural symbolism of disordered gender roles excites anxieties in a political culture still quite unjustly sexist in its understanding of gender roles. Indeed, the condemnation of homosexuality acts as a reactionary reinforcement of sexism generally. Importantly, the emergence of the modern conception of homosexual identity, as intrinsically effeminate (in gay men), and later mannish (in lesbians),¹⁰³ accompanied the emergence of modern Western culture after 1700, and was associated with the reinforcement of the sexist definition of gender roles in terms of which the supposedly greater equality of men and women was interpreted.¹⁰⁴ Male homosexuals as such were thus symbolically understood as "effeminate members of a third or intermediate gender, who surrender their rights to be treated as dominant males, and are exposed instead to a merited contempt as a species of male whore"¹⁰⁵ (in the more overtly sexist and homophile ancient Greek world, only the passive male partner would be thus interpreted).¹⁰⁶ Homosexuals as such—both lesbians and gay men—are, on this persisting modern view, in revolt against what many still suppose to be the "natural" order of gender hierarchy: women or men, as the case may be, undertaking sexual roles improper to their

¹⁰² Cf. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. REV. 187 (1988).

¹⁰³ On the later development of lesbian identity, see FADERMAN, *ODD GIRLS*, *supra* note 59; CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 245-97 (1985).

¹⁰⁴ See generally Randolph Trumbach, *Gender and the Homosexual Role in Modern Western Culture: The 18th and 19th Centuries Compared*, in *HOMOSEXUALITY, WHICH HOMOSEXUALITY?: INTERNATIONAL CONFERENCE ON GAY AND LESBIAN STUDIES* 149, 149-69 (1989).

¹⁰⁵ *Id.* at 153.

¹⁰⁶ For a probing recent study, see EVA CANTARELLA, *BISEXUALITY IN THE ANCIENT WORLD* (Cormac O. Cuilleannain trans., 1992) (1987).

gender (for example, women loving other women independent of men,¹⁰⁷ dominance in women, and passivity in men). It is plainly unjust to display such sexist views, no longer publicly justifiable against heterosexual women, against a much more culturally marginalized and despised group, the symbolic scapegoats of the feeble and cowardly sense of self that seeks self-respect in the unjust degradation of morally innocent people of good will. Homosexuals have the right, on grounds of suspect classification analysis, to be protected from such irrational prejudice. In particular, they have the constitutional right, as a matter of principle, to be protected from the expression through public law of sectarian religious prejudice, targeted specifically against claims for justice by lesbian and gay identity based on the reasonable elaboration of constitutional principles of antidiscrimination and privacy now accepted for all other persons. The sexist roots of modern homophobia should only confirm the irrationalism of the prejudice and the constitutional illegitimacy of its unprincipled expression through public law against one group and one group exclusively: namely, a small and traditionally despised minority, the legitimacy of whose claims are most invisible to public opinion.

It is sexist prejudice of this sort that accounts, in my judgment, for the area of our national public life that is most conspicuously and unashamedly homophobic, the American military.¹⁰⁸ I have noted elsewhere the damage, caused by political liberalism's complicity with sexism, inflicted on the political culture's interpretation of basic human rights (*i.e.*, a hypermasculinized vision of the content and scope of human rights).¹⁰⁹ Exclusion of women from the military surely reflects this misinterpretation,¹¹⁰ and the exclusion of homosexuals is a continuing variation on the same sexist theme.

People serving in the military must satisfy the reasonable requirements for which such service calls, but these requirements have little to do with

¹⁰⁷ For commentary on the sexism of heterosexism, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227, 227-54 (Henry Abelove et al. eds., 1993).

¹⁰⁸ For an excellent and probing analysis of this issue, see Seth Harris, Note, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171 (1989-90); see also Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

¹⁰⁹ See RICHARDS, CONSCIENCE, *supra* note 26, at 178-91.

¹¹⁰ For the Supreme Court's insensitivity to this issue, see *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding as constitutional a gender-based statute authorizing the registration for the draft of men but not women).

gender as such¹¹¹ and nothing to do with sexual preference.¹¹² The confusion of the military virtues of courage and competence with traditional ideas of manliness (including aggressive heterosexual virility) is, at bottom, transparently sexist (as if a woman or homosexual in the military must be either the perpetrator or victim of sexual harassment). It morally insults both women and homosexuals to ascribe to them incapacities of moral control or susceptibilities that reflect and reinforce irrational prejudice in this way. It also disfigures what military service is and should be in the defense of a constitutional culture of human rights.

Military service is a part of that culture and should reflect its best values and aspirations. However, instead of distributing rights and responsibilities on terms that respect all persons as equal members of the political community, the military has been cordoned off from the larger fabric of constitutional principle, a judicially protected bastion of sexist prejudice exempt from reasonable constitutional analysis.¹¹³ This differential treatment is to make of military service not the defense of constitutional values, but their subversion in this last sectarian sanctuary of a corruptly hypermasculinized interpretation of equal rights and responsibilities.

III. ANTI-LESBIAN/GAY INITIATIVES AS CONSTITUTIONALLY INVIDIOUS RELIGIOUS INTOLERANCE

We need now to bring this alternative perspective to bear on the analysis of the constitutionality of anti-lesbian/gay initiatives. These initiatives, exemplified by Colorado Amendment Two,¹¹⁴ constitutionally entrench a prohibition on laws that forbid discrimination on grounds of sexual preference in a much more bald and visibly invidious way than the comparable initiatives struck down by the Supreme Court as entrenching constitutionally invidious racial and religious discrimination.¹¹⁵

¹¹¹ Even the gender-based combat exclusion of women may in contemporary circumstances be largely unreasonable, as Kenneth Karst has recently argued with great force. *See* Karst, *supra* note 108, at 529-45.

¹¹² *See id.* at 545-63.

¹¹³ *See, e.g., Rostker*, 453 U.S. at 57.

¹¹⁴ *See supra* note 3 and accompanying text.

¹¹⁵ Unlike the facially neutral California amendment in *Reitman v. Mulkey*, 387 U.S. 369 (1967), Colorado Amendment Two explicitly singles out lesbians and gay men as a group. The Colorado amendment, in contrast to the California amendment, also constitutionally entrenches not only a prohibition on laws against private discrimination, but against public discrimination as well. Amendment Two also

As I have already argued, discrimination on grounds of sexual preference is, in its nature, a form of religious intolerance, a ground for suspectness older than the Equal Protection Clause itself. The Free Exercise Clause of the First Amendment thus condemns as suspect burdens placed on exercise of conscientious convictions unsupported by a compelling secular justification.¹¹⁶ And its companion, the Establishment Clause, renders suspect state support of sectarian religious views in contexts that encourage the teaching of and conversion to such views.¹¹⁷ The state may not discriminate either against or in favor of sectarian religious conscience, but must extend equal respect to all forms of

imposes a more burdensome requirement than the Akron amendment invalidated in *Hunter v. Erickson*, 393 U.S. 385 (1969). First, rather than requiring a majority of a particular city, any successful repeal effort of Amendment Two requires the approval of an entire state. Second, the amendment struck down in *Hunter* was neutral among claims of any group based on race, religion, or national ancestry whereas Colorado Amendment Two also specifically singles out lesbians and gay men as a group.

¹¹⁶ See RICHARDS, *TOLERATION*, *supra* note 17, at 141-46. Free exercise analysis was somewhat narrowly interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding religiously inspired peyote use not constitutionally exempt from neutral criminal statute criminalizing such use, and thus permitting the state to deny employment benefits to persons dismissed from their jobs because of such use). The case, however, notably acknowledges the continuing authority of leading free exercise cases like *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the denial of state unemployment benefits to Seventh Day Adventist because of her refusal to work on sabbath day to be an unconstitutional burden on her free exercise rights), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a state compulsory education law unconstitutionally burdens free exercise rights of Amish parents to remove children from school after eighth grade). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), the Supreme Court clarified that *Smith* in no way limited the availability of free exercise analysis of a state law that nonneutrally targeted a specific religion (in this case, criminalizing animal sacrifice in Santeria religious rituals). The authority of *Smith* itself is in doubt in light of the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West Supp. 1993). For commentary thereon, see Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883 (1994). The constitutionality of the Religious Freedom Restoration Act of 1993 itself will have to be assessed in light of whether, on grounds of § 5 of the Fourteenth Amendment, it constitutionally expands or unconstitutionally contracts the constitutional right judicially defined by the Supreme Court in its free exercise jurisprudence, including *Smith*. For relevant case law on this question, see *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹¹⁷ See RICHARDS, *TOLERATION*, *supra* note 17, at 146-62.

conscience. State-imposed discrimination on grounds of sexual preference violates such equal respect for all forms of conscience.

Such discrimination takes objection to a conscientious form of moral thought and sensibility precisely because it makes public ethical claims to respect for a private and public identity on equal terms with the other forms of self-organized identity central to the right of conscience (*i.e.*, the wide range of religious and irreligious views protected by both the Free Exercise and Establishment Clauses of the First Amendment).¹¹⁸

Lesbian and gay identity—whether irreligiously, nonreligiously, or religiously grounded—is decidedly one among these views. Such identity is

¹¹⁸ Under the Free Exercise Clause, the Supreme Court has tended, in the interest of reasonably developing the basic value of equality, to expand the constitutional concept of religion to protect conscience as such from coercion or undue burdens. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333 (1970) (declaring congressional statutory exemption from military service—limited to religiously motivated conscientious objectors to all wars—extended to all who conscientiously object to all wars); *United States v. Seeger*, 380 U.S. 163 (1965) (upholding congressional statutory exemption from military service for people who were religiously motivated conscientious objectors to all wars); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (declaring unconstitutional a state requirement that state officials must swear belief in God); *United States v. Ballard*, 322 U.S. 78, 79 (1944) (forbidding any inquiry into the truth or falsity of beliefs in a mail fraud action against the bizarre “I am” movement of Guy Ballard (alias “Saint Germain, Jesus, George Washington, and Godfre Ray King”)). *But see* *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding religiously inspired peyote use not exempt from general prohibition on such drug use and thus may be properly invoked by state to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use); *but cf.* Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West Supp. 1993). For commentary thereon, see Laycock, *supra* note 116. And under the Establishment Clause, the Supreme Court has notably insisted that the public education curriculum may not privilege sectarian religious rituals and views over others. *See, e.g.*, *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (holding nondenominational prayer at high school graduation to be violative of the Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (finding state statute requiring balanced treatment of creationist and evolution science to be violative of the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985) (holding state authorization of one-minute period of silence in public schools “for meditation or voluntary prayer” to be violative of the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding state statute forbidding teaching of evolution in public schools to be violative of the Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding reading of selections from Bible and Lord’s Prayer in public schools to be violative of the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (finding use of state-composed nondenominational prayer in public schools to be violative of the Establishment Clause).

grounded in critically conscientious convictions both about the empowering personal and moral good of homosexual friendship and love (grounded in the basic human good of love) and arguments of public reason about the injustice and ethical wrong of its condemnation and marginalization (centering on the unprincipled failure to respect the self-authenticating right of all persons to the humane and basic good of love). The identity expresses itself in varied personal and political associations of mutual recognition, support, and respect, and in demands for equal justice and for a public culture—including institutional forms¹¹⁹—adequate to the reasonable elaboration and cultivation of its ethical vision of humane value in public and private life. Both its constructive and critical arguments are, in their nature, ethical arguments of public reason, appealing to the fundamental and broadly shared ethical imperative of treating persons as equals.¹²⁰

Such conscientious claims to personal and moral identity are based on the constitutionally guaranteed right to conscience. The constitutional protections for liberty of conscience, grounded on equal respect for conscience, have not been and cannot reasonably be limited to established or traditional churches, for the American tradition of liberty of conscience has extended to and indeed fostered the many new forms of conscience that arose uniquely in America,¹²¹ including the claims of conscience expressed through the abolitionist movement that were so sharply critical of established churches.¹²² Claims to lesbian and gay identity stand foursquare

¹¹⁹ These institutions include, in my judgment, an appropriate framework for public recognition and legitimation, on fair terms, of the rights of intimate association of lesbians and gays as couples and, where appropriate, as parents.

¹²⁰ On the pervasiveness of this ideal in Western religious and ethical culture, see RICHARDS, *TOLERATION*, *supra* note 17, at 69, 71, 78, 93, 123–28, 134, 272–73, 275. For an exploration of the form, content, and force of the critical and constructive aspects of these ethical arguments on behalf of lesbian and gay identity, see *id.* at 269–80; DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* 29–83 (1982); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957 (1979); David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281 (1977).

¹²¹ See generally SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 491–509 (1972) (e.g., Shakers, Society of the Public Universal Friend, New Harmony, Oneida Community, Hopedale, Brook Farm, Mormons); *id.* at 1019–33 (e.g., Science of Health [Christian Science], New Thought, Positive Thinking); *id.* at 1059–78 (e.g., Black Pentecostalism, Father Divine, Sweet Daddy Grace, Nation of Islam, Booker T. Washington, Martin Luther King).

¹²² For specific elaboration and defense of this point, see Richards, *supra* note

in this distinguished tradition of new forms of dissenting conscience and are, as such, fully entitled to constitutional protection on terms of principle. Correlatively, the American tradition of religious liberty has not been and cannot be limited to theistic forms of conscience as such, but embraces all forms of conscience.¹²³ Nor has the tradition been limited to protect only the conscientious identities in which one has been born, for its guarantees are no less for recent converts and include robust guarantees of state neutrality in circumstances that would lend the state's sectarian encouragement to conversion to one form of belief as opposed to another.¹²⁴ All forms of conscientious conviction, whether old or new, theistic or nontheistic, are thus guaranteed equal respect on terms of a constitutional principle that renders issues of conscience morally independent of factionalized politics.

It would trivialize such guarantees, indeed render them nugatory, not to extend them precisely when they are most constitutionally needed: namely, to nonmajoritarian claims of conscience that challenge traditional wisdom on nonsectarian grounds of public reason. Otherwise, the mere congruence of sectarian belief among traditional religions (*e.g.*, about the alleged unspeakable evil of homosexuality) would be, as it was in antebellum America on the question of slavery,¹²⁵ the measure of religious liberty in particular and human and constitutional rights in general. The traditional orthodoxy, to which any form of dissenting conscience takes objection on grounds of public reason, would be permitted to silence as unworthy the newly emancipated voice of such progressive claims of justice. In effect, the culture of degradation that sets the terms of social death to which homosexuals have unjustly been condemned would, on this view, set the terms of argument on their behalf. However, it is precisely such claims to justice of dissenting, antimajoritarian conscience that most require, on grounds of principle, constitutional protection against nescient majorities who would aggressively and uncritically repress such a group on the ground of its daring to make claims to justice critical of the dominant religio-cultural orthodoxy (the aim that Colorado Amendment Two repressively aims to accomplish).

Finally, the ground for discrimination against lesbian and gay conscience, thus understood, is itself, as I earlier suggested, based on sectarian religious convictions—sectarian in the sense that they rest on

68; *see also* RICHARDS, CONSCIENCE, *supra* note 26, at 58–107.

¹²³ *See supra* note 118. For further development of this argument, *see* RICHARDS, TOLERATION, *supra* note 17, at 67–162.

¹²⁴ For fuller discussion, *see* RICHARDS, TOLERATION, *supra* note 17, at 146–62.

¹²⁵ For further development of this point, *see* Richards, *supra* note 68.

perceptions internal to religious convictions and not on public arguments available in contemporary terms to all persons.¹²⁶ This is confirmed, as I earlier suggested, by the failure to extend to lesbian and gay persons public arguments about the acceptability of nonprocreational sex and unacceptability of sexism otherwise available to all persons on fair terms. The expression through public law of one form of sectarian conscience against another form of conscience, without compelling justification in public arguments available to all, is constitutionally invidious, and therefore constitutionally suspect religious intolerance. It both unconstitutionally burdens conscience inconsistent with free exercise principles, and unconstitutionally advances sectarian conscience inconsistent with antiestablishment principles. Discrimination specifically directed against the claims of justice made by and on behalf of lesbian and gay conscience expresses such constitutionally forbidden intolerance.

If discrimination against persons on grounds of sexual preference expresses constitutionally forbidden religious intolerance, the constitutional entrenchment of prohibitions on such discrimination—specifically naming a group in terms of the claims of justice it makes—is unashamedly in service of such discrimination, and, as such, an unconstitutional expression of religious intolerance through public law. The character of the advocacy for such initiatives confirms the grounds for constitutional concern. As I more fully argue below, advocacy groups standardly distort the true nature of their organizations, rely upon discredited experts and facts, and conceal the true purpose of the proposed legislation.¹²⁷ Such irrationalist distortion of facts and values, in polemical service of a dominant orthodoxy now under reasonable examination, is at the core of the political irrationalism condemned by the argument to toleration central to American constitutionalism.¹²⁸

While the issue has usually been discussed in terms of the cases forbidding constitutional entrenchment of laws forbidding racial discrimination, the more exact analogy would be constitutional entrenchment of prohibitions on claims of religious discrimination made precisely by groups most likely to be victimized in Christian America by

¹²⁶ In its position paper, Colorado for Family Values, the sponsor of Colorado Amendment Two, invoked sectarian religious arguments to justify the initiative: "Gay behavior is what the Bible calls 'sin' because sin defines any attempt to solve human problems or meet human needs without regard to God's wisdom and solutions as found in Scripture and in His saving grace and mercy" Niblock, *supra* note 4, at 157 n.17.

¹²⁷ See Note, *supra* note 2, at 1909.

¹²⁸ See RICHARDS, CONSCIENCE, *supra* note 26, at 63–73.

such discrimination (*i.e.*, Jews). To understand the force of this analogy, we must be clear about the nature of the constitutional evil of the expression of anti-Semitism through law, in particular, why such political anti-Semitism violates the argument for toleration central to the proper interpretation of American traditions of religious liberty.¹²⁹

The argument for toleration was a judgment of and response to perceived abuses of political epistemology. The legitimation of religious persecution by both Catholics and Protestants (drawing authority from Augustine,¹³⁰ among others) had imposed a politically entrenched view of religious and moral truth as the measure of permissible ethics and religion, including the epistemic standards of inquiry and debate about religious and moral truth. By the late seventeenth century (when Locke and Bayle wrote),¹³¹ there was good reason to believe that such politically entrenched views of religious and moral truth, resting on the authority of the Bible and associated interpretive practices, assumed reasonably contestable interpretations of a complex historical interaction between Pagan, Jewish, and Christian cultures in the early Christian era.¹³²

The Renaissance rediscovery of Pagan culture and learning reopened the question of how the Christian synthesis of Pagan philosophical and Jewish ethical and religious culture was to be understood. Among other things, the development of critical historiography and techniques of textual interpretation had undeniable implications for reasonable Bible interpretation.¹³³ The Protestant Reformation both assumed and further encouraged these new modes of inquiry, and encouraged as well the appeal to experiment and experience that were a matrix for the methodologies associated with the rise of modern science.¹³⁴ These new approaches to thought and inquiry had made possible the recognition that there was a gap between the politically entrenched conceptions of religious and moral truth and inquiry and the kinds of reasonable inquiries that the new approaches made available. The argument for toleration arose from the recognition of this disjunction between the reigning political epistemology and the new epistemic methodologies.

The crux of the problem was this: politically entrenched conceptions of

¹²⁹ See *id.* on the argument for toleration. See generally RICHARDS, TOLERATION, *supra* note 17.

¹³⁰ See RICHARDS, TOLERATION, *supra* note 17, at 86-88.

¹³¹ See *id.* at 89-98.

¹³² See *id.* at 25-27, 84-98, 105, 125.

¹³³ See *id.* at 125-26.

¹³⁴ For a recent review of the question, see PURITANISM AND THE RISE OF MODERN SCIENCE: THE MERTON THESIS (I. Bernard Cohen ed., 1990).

truth had, on the basis of the Augustinian legitimation of religious persecution, made themselves the measure both of the standards of reasonable inquiry and of who could count as a reasonable inquirer after truth. But, in light of the new modes of inquiry now available, such political entrenchment of religious truth was reasonably seen often to rest not only on the degradation of reasonable standards of inquiry, but on the self-fulfilling degradation of the capacity of persons reasonably to conduct such inquiries. In order to rectify these evils, the argument for toleration forbade, as a matter of principle, the enforcement by the state of any such conception of religious truth. Rather, the scope of legitimate political concern must rest on the pursuit of general ends like life and basic rights and liberties (*e.g.*, the right to conscience). The pursuit of such goods was consistent with the full range of ends free people might rationally and reasonably pursue.¹³⁵

A prominent feature of the argument for toleration was its claim that religious persecution corrupted conscience itself, a critique central to the use of the argument by American abolitionist thinkers in the antebellum period who assumed the argument as the basis for their criticism of American slavery and racism¹³⁶ (and, in the case of a few, sexism as well).¹³⁷ Such corruption, a kind of self-induced blindness to the evils one inflicts, is a consequence of the political enforcement at large of a conception of religious truth that immunizes itself from independent criticism in terms of reasonable standards of thought and deliberation. In effect, the conception of religious truth, though perhaps having once been importantly shaped by more ultimate considerations of reason, ceases to be held or to be understood and elaborated *on the basis of reason*.

A tradition, which thus loses its sense of its reasonable foundations, stagnates and depends increasingly for allegiance on question-begging appeals to orthodox conceptions of truth and the violent repression of any dissent from such conceptions as a kind of disloyal moral treason. The politics of loyalty rapidly degenerates, as it did in the antebellum South's repression of any criticism of slavery, into a politics that takes pride in widely held community values solely because they are community values. Standards of discussion and inquiry become increasingly parochial and insular; they serve only a polemical role in the defense of the existing community values and are indeed increasingly hostile to any more impartial reasonable assessment in light of independent standards.¹³⁸

¹³⁵ See RICHARDS, TOLERATION, *supra* note 17, at 119–20.

¹³⁶ See RICHARDS, CONSCIENCE, *supra* note 26, at 59–63, 73–89.

¹³⁷ See Richards, *supra* note 68, at 795.

¹³⁸ See generally JOHN H. FRANKLIN, THE MILITANT SOUTH 1800–1861 (1956);

Such politics tends to forms of irrationalism in order to protect its now essentially polemical project: opposing views relevant to reasonable public argument are suppressed, facts are distorted or misstated, values are disconnected from ethical reasoning, and deliberation in politics is denigrated in favor of violence against dissent and the aesthetic glorification of violence. Paradoxically, the more the tradition becomes seriously vulnerable to independent reasonable criticism (indeed, increasingly in rational need of such criticism), the more it is likely to generate forms of political irrationalism, including scapegoating of outcast dissenters, in order to secure allegiance.

I call this phenomenon the paradox of intolerance. The paradox is to be understood by reference to the epistemic motivations of Augustinian intolerance.¹³⁹ A certain conception of religious truth was originally affirmed as true and was politically enforced on society at large because it was supposed to be the epistemic measure of reasonable inquiry (*i.e.*, more likely to lead to epistemically reliable beliefs). But the consequence of the legitimation of such intolerance over time was that standards of reasonable inquiry, outside the orthodox measure of such inquiry, were repressed. In effect, the orthodox conception of truth was no longer defended on the basis of reason, but was increasingly hostile to reasonable assessment in terms of impartial standards not hostage to the orthodox conception. Indeed, orthodoxy was defended as an end in itself, increasingly by nonrational and even irrational means of appeal to community identity and the like. The paradox appears in the subversion of the original epistemic motivations of the Augustinian argument. Rather than securing reasonable inquiry, the argument now has cut off the tradition from such inquiry. Indeed, the legitimacy of the tradition feeds on irrationalism precisely when it is most vulnerable to reasonable criticism, contradicting and frustrating its original epistemic ambitions.

The history of religious persecution amply illustrates these truths and, as the abolitionists clearly saw, no aspect of that history more clearly does so than Christian anti-Semitism. The relationship of Christianity to its Jewish origins has always been a tense and ambivalent one.¹⁴⁰ The fact that many Jews did not accept Christianity was a kind of standing challenge to the reasonableness of Christianity, especially in its early period (prior to its

W.J. CASH, *THE MIND OF THE SOUTH* (1941).

¹³⁹ See RICHARDS, *TOLERATION*, *supra* note 17, at 86-88.

¹⁴⁰ For a useful study of the early Christian period, see JOHN A. GAGER, *THE ORIGINS OF ANTI-SEMITISM* (1983). The classic general study is LEON POLIAKOV, *THE HISTORY OF ANTI-SEMITISM* (Vols. I-III, Vanguard Press 1965-75) (Vol. IV, Oxford Univ. Press 1985).

establishment as the church of the late Roman Empire) when Christianity was a proselytizing religion that competed for believers with the wide range of religious and philosophical alternative belief systems available in the late Pagan world.

In his recent studies of anti-Semitism,¹⁴¹ the medievalist Gavin Langmuir characterizes as anti-Judaism Christianity's long-standing worries about the Jews because of the way the Jewish rejection of Christianity discredited the reasonableness of the Christian belief system in the Pagan world. Langmuir argues that the Christian conception of the obduracy of the Jews and the divine punishment of them for such obduracy were natural forms of anti-Judaic self-defense, resulting in the forms of expulsion and segregation from Christian society that naturally expressed and legitimated such judgments on the Jews.¹⁴² In contrast, Langmuir identifies anti-Semitism proper as the totally baseless and irrational beliefs about ritual crucifixions and cannibalism of Christians by Jews that were "widespread in northern Europe by 1350."¹⁴³ Such beliefs led to populist murders of Jews usually, though not always, condemned by both church and secular authorities.

Langmuir suggests, as does R.I. Moore,¹⁴⁴ that the development of anti-Semitism proper was associated with growing internal doubts posed by dissenters during the period 950–1250 about the reasonableness of certain Catholic religious beliefs and practices (e.g., transubstantiation) and the resolution of such doubts by the forms of irrationalist politics associated with anti-Semitism proper (often centering on fantasies of ritual eating of human flesh that expressed the underlying worries about transubstantiation). The worst ravages of anti-Semitism illustrate the paradox of intolerance, which explains the force of the example for abolitionists: precisely when the dominant religious tradition gave rise to the most reasonable internal doubts, these doubts were displaced from reasonable discussion and debate into blatant political irrationalism against one of the more conspicuous, vulnerable, and innocent groups of dissenters.

Langmuir's distinction between anti-Judaism and anti-Semitism proper is an unstable one. Both attitudes rest on conceptions of religious truth that

¹⁴¹ See GAVIN I. LANGMUIR, *TOWARD A DEFINITION OF ANTISEMITISM* (1990) [hereinafter LANGMUIR, DEFINITION]; GAVIN I. LANGMUIR, *HISTORY, RELIGION, AND ANTISEMITISM* (1990) [hereinafter LANGMUIR, HISTORY].

¹⁴² See LANGMUIR, DEFINITION, *supra* note 141, at 57–62.

¹⁴³ *Id.* at 301–02.

¹⁴⁴ See R.I. MOORE, *THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE, 950–1250*, at 34–39 (1987).

are unreasonably enforced on the community at large; certainly, both the alleged obduracy of the Jews and their just punishment for such obduracy were sectarian interpretations of the facts and were not reasonably enforced at large. Beliefs in obduracy certainly are not as unreasonable as beliefs in cannibalism and segregation is not as evil as populist murder or genocide. But, both forms of politics are, on grounds of the argument for toleration, unreasonable in principle. More fundamentally, anti-Judaism laid the corrupt political foundation for anti-Semitism proper and its twentieth century modernist irrationalist atrocity, anti-Semitism as racism.¹⁴⁵ Once it became politically legitimate to enforce at large a sectarian conception of religious truth, reasonable doubts about such truth were displaced from reasonable discussion and debate to the irrationalist politics of religious persecution. The Jews in the Christian West have been the most continuously blatant victims of such politics, making anti-Semitism "the oldest prejudice in Western civilization."¹⁴⁶

For this reason, we would and should condemn immediately constitutional entrenchment of political anti-Semitism—in the form of an initiative that forbade all laws protecting Jews as such against discrimination—as an unconstitutional expression of religious intolerance because such laws serve precisely the forms of majoritarian religious intolerance against which constitutional guarantees of religious toleration are, in fact, most exigently needed. A state that entrenched such initiatives would, in clear violation of free exercise principles, unconstitutionally burden specifically named, conscientious convictions in a blatantly nonneutral way,¹⁴⁷ and, would, in clear contradiction of the principles of our antiestablishment jurisprudence,¹⁴⁸ support a sectarian religious view as the one true church of Americanism to which all dissenters are encouraged to convert. A constitutional jurisprudence that condemns as unconstitutional an unemployment compensation scheme that imposes financial burdens on the convictions of Seventh Day Adventists¹⁴⁹ also must condemn, a fortiori, laws that specifically target for focused disadvantage the convictions of a religion or form of conscience, and must regard as even worse the very naming of the group in question in the

¹⁴⁵ See RICHARDS, CONSCIENCE, *supra* note 26, at 156–60.

¹⁴⁶ LANGMUIR, DEFINITION, *supra* note 141, at 45.

¹⁴⁷ Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (holding state law forbidding animal sacrifice by the Santeria religion to be violative of the neutrality required by the Free Exercise Clause).

¹⁴⁸ See RICHARDS, TOLERATION, *supra* note 17, at 146–62.

¹⁴⁹ See *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963). The authority of *Sherbert* was reaffirmed in *Employment Division v. Smith*, 494 U.S. 872, 876 (1990).

relevant law.¹⁵⁰ In effect, a state that entrenched such initiatives would be the unconstitutional agent of the political evil of intolerance, branding a religious group as heretics and blasphemers to American religious orthodoxy. American constitutionalism, which recognizes neither heresy nor blasphemy as legitimate expressions of state power,¹⁵¹ must forbid exercises of state power, similar to the contemplated initiative, that illegitimately assert such a power—in this case, legitimating the demonic evil of political anti-Semitism. The effect of such initiatives would be to enlist the state actively in the unconstitutional construction of a class of persons lacking the status of bearers of human rights, a status so subhuman that they are excluded from the minimal rights and responsibilities of the moral community of persons. Political atrocity thus becomes thinkable and practical.

The case of anti-lesbian/gay initiatives is, as a matter of principle, parallel. A dissenting form of conscience, precisely on the grounds of its moral independence and dissenting claims for justice, is branded *for that reason* as heresy. The message is clear and clearly intended: persons should convert from this form of conscience that is wholly unworthy of respect to the only true religion of Americanism. The initiative is as much motored by sectarian religion and directed against dissenting conscience as the intolerably anti-Semitic initiative. Homosexuals are to late twentieth century sectarians what the Jews have traditionally been to sectarians in the Christian West throughout its history: intolerable heretics to dominant religious orthodoxy.

The conception that homosexuality is a form of heresy or treason is both an ancient and a modern ground for its condemnation.¹⁵² In fact, there

¹⁵⁰ The imagined case is thus even worse than *Lukumi Babalu*, in which the religion of Santeria was not named specifically in the statute found to be directed unconstitutionally against that religious group.

¹⁵¹ See *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Heresy trials are foreign to our Constitution."). For a discussion of the unconstitutionality of blasphemy prosecutions under current American law of free speech and religious liberty, see LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED FROM MOSES TO SALMAN RUSHDIE* 522-33 (1993).

¹⁵² Throughout the Middle Ages, homosexuals were prosecuted as heretics, and often burned at the stake on that ground. DERRICK S. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 135 (1955). As further evidence of the prosecution of homosexuals as heretics, it is interesting to note that the term "Buggery," one of the terms used for homosexual acts in English law from the 1500s to the 1800s, derived from a corruption of the name of one heretical group which allegedly engaged in homosexual practices. See *id.* at 141, 148-49. For an analysis of the modern use of treason in this context, see PATRICK DEVLIN, *THE ENFORCEMENT OF*

is no good reason to believe that the legitimacy of this form of sexual expression destabilizes social cooperation. Homosexual relations are and foreseeably will remain the preference of small minorities of the population,¹⁵³ who are as committed to principles of social cooperation and contribution as any other group in society at large. The issue, as with all suspect classes, is not one of increasing or decreasing the minority, but one of deciding whether we should treat such a minority justly with respect as persons or unjustly with contempt as unspeakably heretical outcasts. Indeed, the very accusation of heresy or treason illustrates an important feature of the traditional moral condemnation in its contemporary vestments. It no longer rests on generally acceptable arguments of necessary protections of the rights of persons to general goods. To the contrary, both the sexism and condemnation of nonprocreational sex of the traditional view are now inconsistent with the reasonable acceptability as general goods of both gender equality and nonprocreational sex. Today, such condemnation appeals to arguments internal to highly personal, often sectarian religious decisions about acceptable ways of belief and lifestyle. When a moral tradition in this way abandons certain of its essential grounds in general goods, it justly may retain its legitimacy for those internal to the tradition, all the more so because it remains more exclusively constitutive of their tradition. But if those essential grounds are constitutionally necessary for the tradition coercively to enforce its mandates through the criminal law, the abandonment of those grounds must, *pari passu*, deprive the tradition of its constitutional legitimacy as a ground for enforcement through law. The tradition now no longer expresses nonsectarian ethical arguments that may be imposed fairly on all persons, but rather perspectives reasonably authoritative only for those who adhere to the tradition.

MORALS 1-25 (1965). For a rebuttal of Patrick Devlin's analysis, see H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); H.L.A. Hart, *Social Solidarity and the Enforcement of Morals*, 35 U. CHI. L. REV. 1 (1967).

¹⁵³ The original Kinsey estimate that about four percent of males are exclusively homosexual throughout their lives is confirmed by comparable European studies. Paul H. Gebhard, *Incidence of Overt Homosexuality in the United States and Western Europe*, in Pub. No. HSM 72-9116, NAT'L INST. OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS 22-29 (J.M. Livingood, ed., 1972). The incidence figure remains stable even though many of the European countries do not apply a criminal penalty to consensual homosexual sex acts. See WALTER BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 293 (1973). Recent surveys indicate that as little as one percent of the population may be gay and less than half of that number may be lesbian. Kim Painter, *Only 1% of Men Say They Are Gay*, USA TODAY, Apr. 15, 1993, at 1A.

Tony Honore, the English legal scholar, made clear the essential point regarding the contemporary status of the homosexual: "It is not primarily a matter of breaking rules but of dissenting attitudes. It resembles religious or political dissent, being an atheist in Catholic Ireland or a dissident in Soviet Russia."¹⁵⁴ In effect, the enforcement of such sectarian perspectives through law, as through Colorado Amendment Two, is the functional equivalent of a heresy prosecution: persons of lesbian and gay identity, precisely in virtue of their conscientious claims to equal justice, are branded as subhuman heretics to true values, and told unambiguously to convert or, at a minimum, ashamedly to return to the silence and invisibility of the closet. The grounds for prohibition are highly personal, ideological, or political views about which free persons reasonably disagree. The continuing force of the prohibitions rests not on protection of the rights of persons, but on fears and misunderstandings directed at the alien way of life of a small and traditionally condemned minority, as if the legitimacy of one's own way of life requires the illegitimacy of all others. Constitutional toleration, which forbids heresy and blasphemy prosecutions and sharply circumscribes treason prosecutions,¹⁵⁵ must likewise be extended to condemnations through law that have the political force of heresy, blasphemy, and treason prosecutions.

Indeed, constitutional arguments of toleration are, if anything, more needed in this area than obviously conventional forms of religious discrimination precisely because the uncritical complacencies of American majoritarian opinion conspicuously fail to recognize the constitutional dimensions of the issue involved in the case of a traditionally despised and stigmatized minority, a fact evidently shown by majoritarian acquiescence in Colorado Amendment Two. As earlier noted, distortions of fact and value are made and accepted in polemical support of an entrenched orthodoxy now under reasonable attack.

This reasonable attack has included criticisms of such tradition both for its mandatory procreational demands and for its sexism. Both of these criticisms have, under American public law, been expressed significantly through constitutional principles of privacy and antidiscrimination for the benefit of the dominant heterosexual majority of both men and women. The entrenched orthodoxy is now under much reasonable critical attack, certainly in almost every imaginable aspect of heterosexual sexuality.¹⁵⁶

¹⁵⁴ TONY HONORE, *SEX LAW* 89 (1978).

¹⁵⁵ See U.S. CONST. art. III, § 3.

¹⁵⁶ See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (finding unconstitutional a state law that placed an undue burden on a woman's ability to decide whether to terminate a pregnancy); *Roe v. Wade*, 410 U.S. 113 (1973) (finding

The orthodoxy, now in retreat in the domain of heterosexual sexuality, does not, however, extend such reasonable criticisms, as a matter of principle, to the examination of its traditional orthodoxy about homosexual sexuality. Rather, consistent with the paradox of intolerance as in the case of Christian reasonable doubts about transubstantiation, it displaces its doubts from the reasonable doctrinal criticism of which it is most in need to the irrationalist scapegoating of a traditionally despised and culturally subjugated minority. In service of that aim, opposing views relevant to reasonable public argument are suppressed, facts are distorted or misstated, and values are disconnected from ethical reasoning. Indeed, deliberation in politics is denigrated in favor of a conception of politics that allegedly, as we shall see, *requires* the constitutional repression of dissent, a symbolic glorification of violence against claims of human rights.

The arguments offered in support of Colorado Amendment Two exemplify the features of the irrationalist politics associated with the paradox of intolerance. Six such arguments were examined and rejected by Judge Bayless in *Evans v. Romer*:¹⁵⁷ (1) the factionalized character of lesbian and gay identity,¹⁵⁸ (2) its militant aggression,¹⁵⁹ (3) the protection of existing suspect classes,¹⁶⁰ (4) privacy and religious rights of the heterosexual majority,¹⁶¹ (5) not subsidizing political objections of interest groups,¹⁶² and (6) protecting children.¹⁶³ Each argument reflects the distortions of fact and value central to the paradox of intolerance.

(1) Justifying Colorado Amendment Two as deterring political factionalism inverts what is, in fact, a political attack on basic human and constitutional rights into the alleged necessity to defend proper democratic politics by the repression of dissent. Judge Bayless properly observed that

unconstitutional a state law prohibiting an abortion except pursuant to medical advice for purpose of saving mother's life); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding unconstitutional a state law prohibiting doctor or registered pharmacist from distributing contraception to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding unconstitutional a state law statute forbidding use of contraception).

¹⁵⁷ *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753 (Colo. Dist. Ct. 1993). Judge Bayless examined the arguments in light of the standard of strict scrutiny required by the Colorado Supreme Court in *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

¹⁵⁸ *Evans*, 63 Fair Empl. Prac. Cas. (BNA) at 755-56.

¹⁵⁹ *Id.* at 756-57.

¹⁶⁰ *Id.* at 757-58.

¹⁶¹ *Id.* at 758-59.

¹⁶² *Id.* at 759.

¹⁶³ *Id.*

"[t]he history and policy of this country has been to encourage that which defendants seek to deter," concluding that "[t]he *opposite* of defendants' first claimed compelling interest is most probably compelling."¹⁶⁴ The abuse of the theory of faction in American constitutionalism is a particularly striking example of the way argument on behalf of Colorado Amendment Two travesties the American constitutional tradition that it claims to honor. The theory of faction was developed by James Madison to identify permanent tendencies of human nature in politics, in particular, tendencies for groups to bond on the basis of sectarian abridgement of the legitimate weight owed to the human rights and interests of outsiders.¹⁶⁵ Madison gave particular weight to religious factions because of their tendency to deny to outsiders respect for their inalienable right to conscience.¹⁶⁶ It is simply Orwellian for the sectarian advocates of Colorado Amendment Two to justify its factionalized abuse of American constitutionalism on the grounds of combating faction. They exemplify the evil against which they claim to do combat.

(2) Judge Bayless found the argument of combating "militant gay aggression"¹⁶⁷ to be factually baseless.¹⁶⁸ Lesbians and gay men are a small minority of the American population. Although perhaps relatively affluent¹⁶⁹ and sometimes influential,¹⁷⁰ their political gains have been

¹⁶⁴ *Id.* at 756.

¹⁶⁵ For a fuller discussion of the development of the theory of faction, see RICHARDS, FOUNDATIONS, *supra* note 17, at 32-39.

¹⁶⁶ *Id.*

¹⁶⁷ *Evans*, 63 Fair Empl. Prac. Cas. (BNA) at 756.

¹⁶⁸ *Id.* at 757.

¹⁶⁹ Marketing studies indicate lesbian and gay incomes are far in excess of the national average. Joya L. Wesley, *With \$394 Billion in Buying Power, Gays' Money Talks and Corporate America Increasingly is Listening*, ATLANTA J. & CONST., Dec. 1, 1991, at F5. The 1990 census, measuring statistics for gay unmarried couples for the first time, showed gay male couples to have higher incomes than any other group, including heterosexual married couples. Margaret S. Usdansky, *Gay Couples, By the Numbers-Data Suggest They're Fewer Than Believed, But Affluent*, USA TODAY, Apr. 12, 1993, at 8A. However, two recent studies have challenged this conception. One study found that homosexual couples have about the same household incomes as heterosexual couples of similar education levels, while another study found that homosexuals generally earned less than similarly situated heterosexuals because of discrimination. Karen DeWitt, *Gay Presence Leads Revival of Declining Neighborhoods*, N.Y. TIMES, Sept. 6, 1994, at A14.

¹⁷⁰ For a popular media account of gay power and influence, see Joni Balter, *Gay Power Brokers—Money, Stature and Savvy Give Leaders More Clout*, SEATTLE TIMES, Aug. 1, 1993, at A1.

comparatively small,¹⁷¹ and they remain underrepresented in key government positions.¹⁷² Against this factual background, an argument of

¹⁷¹ Only a handful of states and a comparatively tiny number of municipalities protect lesbians and gays from discrimination. Of the 77 jurisdictions that have any sort of legislation or other government decree protecting lesbians and gay men, 16 are merely resolutions, guidelines, or policy statements and are not fully binding. See Affidavit of Political Science Professor Kenneth Sherrill, Defendant's Motion for Summary Judgment, *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) (No. 88-3669-OG), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc granted and judgment vacated*, (Jan. 7, 1994), *reprinted in GAYS AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES* 114 (Marc Wolinsky & Kenneth Sherrill eds., 1993) [hereinafter *GAYS AND THE MILITARY*]. Only four states—Wisconsin, Massachusetts, Connecticut, and Hawaii—have any statewide legislation protecting the rights of homosexuals, whereas seven others have executive orders issued by governors. These executive orders are limited by the range of gubernatorial power and are rescinded more easily than legislation. *Id.* In half of the states, no jurisdiction whatsoever has any legislation or other governmental decree or policy that protects the rights of lesbians and gay men. *Id.* The importance of this legislation cannot be overstated. As a recent *Harvard Law Review* study observes: "[V]ery little legislation protects gay men and lesbians from discrimination in the private sector. No federal statute bars discrimination by private citizens or organizations on the basis of sexual orientation. Nor do the states provide such protection: only Wisconsin has a comprehensive statute barring such discrimination in employment." Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1667 (1989).

¹⁷² The Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), found women as a class to be relatively politically powerless, despite the fact that then, as now, they constituted a majority of the electorate, because they were "vastly underrepresented in this Nation's decisionmaking councils." *Id.* at 686 n.17. The Court based its conclusions on the fact that no woman had ever been elected President; that there had not yet been a woman Supreme Court Justice; that there were then no women in the United States Senate (although women had served as senators in the past); and that there were then only 14 women in the House of Representatives. *Id.* By this standard, lesbians and gay men are even more underrepresented. There has never been an openly gay President, nor Supreme Court Justice, nor even an openly gay federal court judge. There are no openly gay United States Senators today, and there have never been any. Until 1984, there were no openly gay members of the United States House of Representatives, and even though there are currently two gay House members, Congressmen Gerry Studds and Barney Frank, neither revealed his sexual orientation until after being elected. See Defendant's Motion for Summary Judgment, *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991) (No. 88-3669-OG), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc granted and judgment vacated*, (Jan. 7, 1994), *reprinted in GAYS AND THE MILITARY*, *supra* note 171, at 20.

"militant gay aggression" bespeaks a use of facts and values all too familiar in the history of intolerance, most grotesquely so in the twentieth century. Thus, the argument remarkably transforms the minority status of homosexuals, analogous to the irrationalist appeals central to political anti-Semitism, into a secret and powerful conspiracy from which politics must be protected. In effect, the very attempt by homosexuals or Jews to make any basic claims of equal citizenship and any small gains thus secured, including relative affluence and occasional influence, are irrationally interpreted as a murderous attack on dominant majorities. Normative outrage at the very idea of an outcast's claim of rights remakes reality to rationalize nullification of such rights. On this hallucinatory ground, aggression against basic rights of lesbian and gay persons is, as with Hitler's comparable justification for his war on the Jews,¹⁷³ ideologically inverted into a reasonable "defensive measure"¹⁷⁴ justified on grounds of self-defense. No other argument offered in defense of Colorado Amendment Two more starkly communicates the hermetically Manichean sectarian world view of its proponents—its polemical power to act as a distorting prism to remake reality in its own ideological image of the wars of religion and to rationalize its conduct accordingly. The persecutor is transformed imaginatively into the victim, thereby rendering persecution innocent and indeed honorable. It is in such terms that good Germans acquiesced in Hitler's war on the Jews; it is in such terms that good Americans acquiesced in Colorado's war on lesbian and gay persons.

(3) Judge Bayless rejected the justification of Colorado Amendment Two as protecting existing suspect classes both because it lacked factual support and on the normative ground that fiscal concerns were inadequate to justify abridgement of basic rights and interests.¹⁷⁵ The alleged justification depends on an uncritical and indefensible inversion of a claim by lesbian and gay persons to basic equal justice, based on antidiscrimination principles available to all, into a claim for unequal, "special" rights, subversive of guarantees of equality. Several courts have rejected as intrinsically distorting and manipulatively question-begging the wording of anti-lesbian/gay initiatives and referenda as opposing special laws for homosexuals.¹⁷⁶ But, the implicit justification of such laws, as

¹⁷³ For a characteristic example of the inversion of victims into aggressors and the compelling need to defend against them, see ADOLF HITLER, *MEIN KAMPF* 824–27 (Reynal & Hitchcock 1939) (1925–26).

¹⁷⁴ *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753, 756 (Colo. Dist. Ct. 1993).

¹⁷⁵ *Id.* at 757–58.

¹⁷⁶ See, e.g., *Faiveas v. Municipality of Anchorage*, 860 P.2d 1214 (Alaska

combating special rights, reaches the same result. In effect, such polemics refuse to acknowledge what they are doing and intend to do: forbidding antidiscrimination laws. They do so by willfully suppressing the issues of principle common to all antidiscrimination laws, in effect, targeting an unpopular minority for making the same kind of claim that all other groups have made for such laws. Popular hostility thus is directed unreasonably at one form of antidiscrimination law by a rhetoric—confusing antidiscrimination with affirmative action—that irrationally stimulates unreflective social prejudice against a group precisely because it makes claims to antidiscrimination protections on grounds of principle.¹⁷⁷

(4) Judge Bayless acknowledged that, in contrast to other alleged compelling state interests, the justification of Colorado Amendment Two in terms of protecting rights of personal, familial, and religious privacy at least articulated compelling state interests.¹⁷⁸ He denied, however, that the amendment in question was, in light of its abridgement of the rights of homosexuals to nondiscrimination, sufficiently narrowly drawn to achieve these compelling interests.¹⁷⁹ In fact, the justification of Colorado Amendment Two in this manner reveals quite clearly why, in the terms urged in this Article, the Amendment reflects constitutionally invidious religious intolerance. As Judge Bayless noted, “[i]n the present case, the religious belief urged by defendants is that homosexuals are condemned by scripture and therefore discrimination based on that religious teaching is protected within freedom of religion.”¹⁸⁰ On this basis, discrimination

1993); *Mabon v. Keisling*, 856 P.2d 1023 (Or. 1993); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

¹⁷⁷ In effect, such rhetoric unreasonably confuses the case for antidiscrimination laws with the different, though related, case for affirmative action. Popular animus against affirmative action thus is brought unreasonably to bear on antidiscrimination laws as such, when antidiscrimination laws and affirmative action are quite different. In fact, strong proponents of antidiscrimination laws are sometimes skeptical of affirmative action. See, for example, Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). There may be a good case for affirmative action in many areas, including, as earlier suggested in this Article, sexual preference. But, the case for affirmative action is quite different from that for antidiscrimination laws. Conflating these questions uniquely in the matter of sexual preference unreasonably condemns arguments for antidiscrimination laws on grounds appropriate, if at all, for affirmative action. Such rhetoric irrationally stimulates the prejudice that antidiscrimination laws should combat.

¹⁷⁸ *Evans*, 63 Fair Empl. Prac. Cas. (BNA) at 758.

¹⁷⁹ *Id.* at 758-59.

¹⁸⁰ *Id.* at 758.

against Jews, African-Americans, and women could be similarly justified as protected by religious freedom because some sectarian interpretation of the Bible or its equivalent in other religious traditions could and would regard each of them as condemned. We would reject such an argument in such cases for the same reason we should reject it in the case of Colorado Amendment Two: under the basic terms of the American tradition of both free exercise and antiestablishment, let alone equal protection, the abridgement of basic rights requires a compelling, secular, nonsectarian justification.¹⁸¹ The interpretation and justification of American religious liberty, enforced through Colorado Amendment Two, is, by its own admission, a sectarian interpretation of the Bible (with which many religious people in the Christian tradition disagree),¹⁸² and, as such, an unconstitutional expression of religious intolerance through public law. In the Orwellian world of Colorado Amendment Two, sectarian religion has become the measure of respect for the inalienable right of conscience.

(5) Judge Bayless rejected the justification of Colorado Amendment Two as preventing the subsidy of political objectives by focusing on the example urged in support of it, namely, a landlord forced to rent to a homosexual couple, and thus forced to accept a political ideology.¹⁸³ Bayless found this "remarkable" conclusion to be lacking in authority as well as "logic," unsupported "by any credible evidence or any cogent argument."¹⁸⁴ The same argument could, of course, be made against all antidiscrimination laws, which address, of course, acts of discrimination, not thoughts alone.¹⁸⁵ On the view taken by this justification for Colorado Amendment Two, the lowest level of irrational prejudice (about which everyone agreed) would fix the scope of antidiscrimination laws, and of course, render them ineffective in the protection of any minority. The argument is unacceptable as a matter of basic principle in any area of antidiscrimination law, including race, religion, gender, and sexual preference, which shows again the unprincipled character of the

¹⁸¹ For a fuller discussion of this argument, see RICHARDS, *TOLERATION*, *supra* note 17, at 67-162; RICHARDS, *CONSCIENCE*, *supra* note 26, at 63-73.

¹⁸² See, e.g., BAILEY, *supra* note 152; JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* (1980); JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* (1976).

¹⁸³ *Evans v. Romer*, 63 Fair Empl. Prac. Cas. (BNA) 753, 759 (Colo. Dist. Ct. 1993).

¹⁸⁴ *Id.*

¹⁸⁵ For assistance on this point, see *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (holding that penalty enhancement for battery on ground of racial bias against victim did not violate defendant's free speech rights by purporting to punish his biased beliefs).

justifications urged in support of Colorado Amendment Two (the argument here is urged only against laws prohibiting discrimination on grounds of sexual preference).

(6) Judge Bayless dismissed the defense of Colorado Amendment Two in terms of protecting children as unsupported by evidence, noting compelling evidence "that pedophiles are predominantly heterosexuals not homosexuals."¹⁸⁶ Colorado for Family Values, in its basic position paper on Amendment Two, had forthrightly espoused a range of such willful factual distortions by comparing homosexual orientation to "murder, theft, fraud, necrophilia, bestiality, and pedophilia."¹⁸⁷ In effect, elementary demands by lesbian and gay persons for equal treatment of their claims to the rights and responsibilities of adult public and private life have been transmogrified by advocates of Colorado Amendment Two, with no factual basis whatsoever, into bizarre claims to seduce and exploit the young as well as to murder and the like. We are, literally, in the same sectarian imaginative world as medieval anti-Semitism, in which fantasies of cannibalism became the rationalizing measure of the massacre of the innocent and the just. There are apparently no self-critical limits of accountability to fact or argument in a politics driven by the fantasies of sectarian religious intolerance, as is evident both from the history of anti-Semitism and from its more recent American expression, the religious war on lesbian and gay identity. We need now, as much as ever, to remind ourselves of, to preserve, and to give effect to the American constitutional tradition of toleration that condemns as indecent a self-deceived and self-deceiving polemical politics, which through fantasy and fraud creates a gargantuan appetite for the rights-denying evils upon which it monstrously feeds.

The perspective of the advocates of Colorado Amendment Two is that of a now much embattled religious orthodoxy on matters of sexuality and gender, one that frames its factual and normative distortions, reflected in all six arguments examined, by the explanatory observation that homosexuals "often express deep hostility to traditional, Judeo-Christian moral beliefs and [family] values."¹⁸⁸ The terms of its homophobic agenda are self-consciously those of a larger, religiously sectarian "great cultural war."¹⁸⁹ What makes such a sectarian normative world both plausible and so politically powerful is precisely the same dynamic that made political

¹⁸⁶ *Evans*, 63 Fair Empl. Prac. Cas. (BNA) at 759.

¹⁸⁷ Niblock, *supra* note 4, at 170.

¹⁸⁸ *Id.* at 115 n.70.

¹⁸⁹ See Robert Sullivan, *An Army of the Faithful*, N.Y. TIMES, Apr. 25, 1993, § 6 (Magazine), at 40.

anti-Semitism plausible and powerful, namely, the paradox of intolerance.

The objection to homosexuals on the basis of their criticism of certain beliefs reveals this tangled political pathology. In fact, such traditional religious beliefs have been criticized, on religious and nonreligious grounds, by a wide range of persons, most of them in fact heterosexual critics of a religion's indefensible insistence on procreational sexuality and its sexism.¹⁹⁰ Criticisms of these sorts in fact have shaped significantly the interpretation of basic constitutional principles of both privacy and equal protection applicable to a wide range of issues relating to sexuality and gender.¹⁹¹ Crucially, however, objection is not taken to such heterosexual critics, who would, as a matter of principle, be as logically prone to such sectarian condemnation as homosexual critics. But, the paradox of intolerance, in its nature, defies logic, suppressing internal critical doubts it might reasonably entertain—or, most probably, does entertain—about traditional religious views concerning heterosexual sexuality by singling out one group as the symbolic scapegoats of the embattled religious orthodoxy. Thus, among all the persons critical of traditional religious views, only one group is singled out by name by Colorado Amendment Two, one already the traditional object of unreasoning hatred and ignorance. The willful dynamics of the paradox of intolerance motor whatever rationalizing distortions of facts and values support its sectarian objective. The defense of the human rights of lesbian and gay persons becomes faction; arguments for such rights, unjust aggression; equality, inequality; sectarian convictions, the measure of the religious liberty; laws against discrimination, subsidizing an ideology; and factual falsities, truths.

Such insults to reason bespeak contempt for reason. Their appeal is not to arguments based on impartial standards of epistemic and practical reason, which, as evidenced in all six arguments examined, they blatantly flout. The nerve of their unreasonableness is their failure to extend such impartial standards to both a certain kind of claim and to the making of such a claim by lesbian and gay persons. Rather, their intrinsically irrationalist appeal turns on the manifold strategies of self-deception through which polemically entrenched convictions conceal from themselves and others their incoherence and their unreasonable willfulness precisely when they are under reasonable criticism and debate both internally and

¹⁹⁰ For a useful history of such arguments criticizing contraception laws, see generally LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1977).

¹⁹¹ See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

externally in the larger society.¹⁹² The motivation of such strategies centers here on the grotesquely unreasonable interpretation accorded both the substance of the claims made and the making of such claims by lesbian and gay persons, in particular, substantive arguments of basic human rights claimed by lesbian and gay persons as bearers of human rights. In each of the six arguments examined, the motivation centers on distortions of fact or value that aim to rationalize, to those already committed to the traditional orthodoxy, its failure both to recognize the substance of such arguments and the right of lesbian and gay persons to make such arguments. The effort of reasonable justification is simply not recognized or acknowledged as owing to lesbian and gay persons, as persons. To the contrary, both the substance and the making of such rights-based claims, as normative claims, *must* be denied any factual or normative basis whatsoever. The threat of lesbian and gay identity is, from this perspective, its expression of the powers of moral personality to originate legitimate claims of human rights. It is this perspective and only this perspective that can explain why, in the case of each of the six arguments examined, claims of lesbian and gay identity have, as such, been inflated in the irrationalist terms of an aggressive threat, and why, in service of such irrationalism, the most minimal standards of intellectual and ethical responsibility in making political arguments have not been extended to lesbians and gay men as citizens and as persons. Such unreason violates the basic norms of civility central to the reasonable justification of political power in a constitutional democracy.¹⁹³ Its unreason strips political power of legitimacy, and renders it a work of willful political violence that shames our constitutionalism. As one court observed in striking down a comparable initiative: "All that is lacking is a sack of stones for throwing."¹⁹⁴

Such arguments draw their irrationalist polemical power, in the same way anti-Semitism drew its political power, from a long history of cultural exclusion and degradation, in this case, of homosexuals from the Western religio-moral community. An embattled religious orthodoxy chooses to suppress its own reasonable doubts about its tradition by choosing one small, traditionally despised group of dissenters, and engages in a politics of identity, based on the paradox of intolerance, that effectively demonizes this group as heretics to moral value in living. The powerful political

¹⁹² For an illuminating philosophical study of these issues, see generally DENISE MEYERSON, *FALSE CONSCIOUSNESS* (1991).

¹⁹³ See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

¹⁹⁴ *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648, 659 (Cal. Ct. App. 1991), *review denied*, No. S0-24940, 1992 Cal. LEXIS 1251 (Cal. Mar. 12, 1992).

appeal of such polemics rests on a long cultural tradition of radical subjugation of the group in question, who, traditionally silenced and silent, barely are recognized as human and certainly are not acknowledged as persons. In effect, a public opinion, formed on injustice, is aroused polemically to insist on its status as the measure of justice, and thus acquiesces in degrading, as Colorado Amendment Two does degrade, dissenters to its injustice from the very constitutional possibility of a person of conscience worthy of making elementary claims to justice. The constitutional evil of this initiative is transparently revealed in and by its very terms, that is, its constitutional entrenchment of a prohibition on the claims of justice made by and on behalf of this group and only this group.

Uncritical majoritarian complacency cannot be the measure of human rights in a constitutional community committed to the theory and practice of human rights as the measure of the demands that the community legitimately may make on its citizens.¹⁹⁵ Yet, it is precisely such unreflective complacency that fails to take seriously both the conscientious character of lesbian and gay identity as one among the legitimate forms of conscience which a rights-respecting state must treat as equals and the unconstitutionally sectarian character of the attempt to legitimate discrimination against such forms of conscience. The measure of constitutionally protected human rights of toleration cannot be intolerance itself. Rather, it is such sectarian insularity that requires constitutional criticism and scrutiny in the interest of protecting human rights, such as those of lesbian and gay persons, that are now so visibly at threat.

On this view, initiatives such as Colorado Amendment Two unconstitutionally enlist the state as the agent of the political construction of intolerance in the same way that, in the earlier parallel example, the state unconstitutionally constructed political anti-Semitism. In neither case can or should the fact of a long history of injustice, whether of Christian or anti-Christian anti-Semitism¹⁹⁶ or the subjugation of women and homosexuals, be the just measure of constitutional argument. In each of these cases, the interpretive responsibilities imposed by constitutional guarantees of basic human rights, such as conscience, must be to resist and repel the force of such history, precisely when such history is aggressively used against wholly just claims of constitutional rights made by and on behalf of a group of persons, such as homosexuals, that has only recently reclaimed its rights of human nature against a tradition of subjugation and

¹⁹⁵ For further development of this point, see RICHARDS, FOUNDATIONS, *supra* note 17, at 78-171.

¹⁹⁶ For a brief discussion of anti-Christian anti-Semitism, see RICHARDS, CONSCIENCE, *supra* note 26, at 156-57.

repression.¹⁹⁷

Concern for such a tradition of subjugation and its vestiges is a matter of constitutional dimensions in the United States because of the pivotal role of the Thirteenth Amendment in the structure of the Reconstruction Amendments, in particular, its constitutionally enforceable judgment of the wrongness of slavery and involuntary servitude on grounds of their abridgement of fundamental human rights.¹⁹⁸ This judgment condemns what can be called moral slavery:¹⁹⁹ the unjust degradation of whole classes of persons from their status as bearers of human rights into a servile status. This judgment has been interpreted reasonably to condemn not only African-American slavery, but also the traditional subjugation of women.²⁰⁰ It would also condemn, as a matter of principle, the long history of Christian Europe's restrictions on Jews (including access to influential occupations, intercourse with Christians, living quarters, and the like) justified, as it was by Augustine among others, in the quite explicit terms of moral slavery: "The Jew is the slave of the Christian."²⁰¹ In each of these cases, unjust deprivation of basic human rights to a class of persons—African-Americans, women, Jews—rendered them into a social and legal status rationalized as capable only of limited, socially conceived servile roles.²⁰²

Constitutional condemnation of moral slavery applies, as a matter of principle, to homosexuals for reasons earlier advanced. Homosexuals have been degraded from their status as bearers of basic human rights, and that status has been crucial in service of a social and legal role rationalized in terms of servile cultural marginality to the dominant sexist stereotypes of the appropriate gender roles of men and women. The analogy to the rationalization of European anti-Semitism is, again, strikingly similar. Just as the Jews were condemned to servile status as the slaves of Christians because of their refusal to convert, lesbians and gay men were and are

¹⁹⁷ For a discussion of the relatively recent emergence of a self-identified homosexual minority in the United States, see generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

¹⁹⁸ See RICHARDS, *CONSCIENCE*, *supra* note 26, at 114-16, 121, 129.

¹⁹⁹ I develop this theme in Richards, *supra* note 68.

²⁰⁰ See, e.g., Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973). For historical background in the abolitionist movement (most notably, the Grimke sisters) of the interpretive judgment that the subjection of women was moral slavery, see Richards, *supra* note 68.

²⁰¹ LANGMUIR, *HISTORY*, *supra* note 141, at 294.

²⁰² For elaboration of this point in the case of European Jews, see *id.* at 294-97, 345-46; LANGMUIR, *DEFINITION*, *supra* note 141, at 156-57, 165-66.

condemned to servile marginality because of their dissidence from conventional gender roles as defined and enforced by the dominant and now embattled religio-cultural orthodoxy.

The moral slavery of homosexuals today in America indeed may cut deeper and thus more unjustly into moral personality than that of African-Americans, women, and Jews. For one thing, the moral slavery of these latter groups was usually rationalized in terms of some legitimate, albeit servile, social space that the group might occupy. However, the social space occupied by homosexuals was and is that of the culturally unspeakable, which is the ultimate in cultural death and invisibility. For another, African-Americans and women appeal to and elaborate a heritage of American antiracist and antisexist dissent at least as old as the abolitionist movement.²⁰³ Jewish Americans appeal both to a long historical tradition of learned dissent from Christian orthodoxy and to the constitutional principles of respect for dissenting conscience central to the American tradition of free exercise and antiestablishment.²⁰⁴ The critical resources of the struggle for justice of lesbians and gay men are altogether more recent and fragile,²⁰⁵ and are certainly not of a strength remotely commensurate to the strength of their arguments for justice. Indeed, the very making of such claims is regarded by many Americans as, at best, laughable, and, at worst, the object of vilifying unreason reflecting a constitutionally decadent public opinion in which a lowest common denominator of unreflective majoritarian preferences is taken to be the measure of human and constitutional rights. A nation, in which majorities are thus demagogically persuaded, realizes the darkest nightmare of the tyrannical majority that worried America's constitutional founders.²⁰⁶

It could not be a reasonable constitutional argument of principle that we should extend only basic protections of civil liberties to groups who have a significant tradition of dissent already recognized and, to some extent, vindicated. Indeed, to the contrary, the relative recency and frailty of claims of constitutional justice to lesbian and gay identity surely render the constitutional protection of such claims of conscience all the more

²⁰³ See generally RICHARDS, CONSCIENCE, *supra* note 26; see also Richards, *supra* note 68.

²⁰⁴ See generally RICHARDS, TOLERATION, *supra* note 17.

²⁰⁵ For an important recent study of some of these resources, see generally JONATHAN DOLLIMORE, SEXUAL DISSIDENCE: AUGUSTINE TO WILDE, FREUD TO FOUCAULT (1991).

²⁰⁶ For James Madison's worries about the tyrannical propensities of majority rule and the role of constitutionalism in limiting these propensities, see RICHARDS, FOUNDATIONS, *supra* note 17, at 107-09, 135, 180.

exigent as a matter of constitutional principle.

Both the recency and frailty of the critical resources of lesbian and gay identity reflect not the merits of their case, but the extraordinary history of moral subjugation of homosexuals and, as earlier discussed, the reality-shaping power with which that dehumanizing history still so powerfully affects many Americans in the late twentieth century. In effect, one of the graver forms of constitutionally condemned traditions of moral slavery still flourishing in the late twentieth century is, precisely in virtue of the power of the tradition of subjugation, the one most invisible to the complacent American public mind. In late twentieth century America, such a public mind is for this reason, so uncritically and so easily polemically aroused to inflict, with such guiltless self-righteousness, the tyrannies that moral slavery wreaks on moral personality.

The devastating cultural force of this tradition of subjugation historically has been its claim of unspeakability, which deprived persons of homosexual orientation of the resources of speech and thought, and thus, of critical conscience central to an independent moral life, which is a basic inalienable right of every person. It is this tradition of compulsory unspeakability that has responded so aggressively to ethical, political, and constitutional claims of lesbian and gay identity resting on the deeper claim to voice and speech, in effect, claiming the most basic right of every person, the right of conscience. The aggressive target of Colorado Amendment Two is this claim and this right. The political power of the unjust tradition of silencing the humanity of homosexuals remains considerable and is easily deployed, as in passage of Colorado Amendment Two, to quash the vulnerable voice of recently emancipated conscientious dissent precisely because of its arguments for justice. This voice is central to the integrity of American constitutionalism and one most worthy of constitutional protection. The claims for justice of lesbians and gay men in the late twentieth century are based on the most insistent demand of American constitutionalism itself, the right to conscience.

Claims of lesbian and gay identity have this status and force, and the aggressive attack on these claims, reflected in the complacent majoritarian nescience underlying the adoption of Colorado Amendment Two, unconstitutionally enlists the state as the agent not just to deny basic rights, but to construct the political evil of the intolerant subjugation of persons from their status as bearers of human rights. As with anti-Semitism, this is the form of basic dehumanization that renders atrocity thinkable and practical. It should have no place in a constitutional order committed to conserve guarantees of basic human rights owed all persons on terms of principle.

IV. CONSTITUTIONAL ARGUMENTS AGAINST ANTI-LESBIAN/GAY INITIATIVES REVIEWED

It is striking to note that constitutional arguments against anti-lesbian/gay initiatives earlier discussed fail to bring into play the alternative perspective on the matters previously proposed. Yet, in each case, this alternative perspective either clarifies or strengthens the arguments.

Hans Linde's development of a Guarantee Clause objection to these initiatives frames its interpretive position with clear reference to what one may now acknowledge to be the constitutionally protected right to conscience. Linde urges the force of a Guarantee Clause objection precisely in those cases most likely to implicate the constitutional evil of politically powerful religious intolerance.²⁰⁷ Guarantee Clause objections to initiatives surely have their greatest constitutional force in such contexts and should be pursued aggressively for this reason.

The argument for the constitutional suspectness of sexual preference is, if anything, clarified and strengthened by reconceiving the argument in terms of religious intolerance. In effect, the argument for the suspectness of sexual preference draws upon the historically oldest and textually clearest guarantees of human rights in the American constitutional tradition, the religion clauses of the First Amendment. Sexual preference is and should be constitutionally suspect because state action on this ground reflects sectarian intolerance of claims to ethical, political, and constitutional identity central to the right to conscience. In effect, the problem with initiatives like Colorado Amendment Two is in that they unconstitutionally burden such claims of conscience and encourage conversion to sectarian moral orthodoxy. It is the unjust sectarian degradation of the identity of lesbian and gay persons that is central to the suspectness of sexual preference, thus linking the suspectness of sexual preference to the comparable reasons—the unjust degradation of African-American and gender identity—for the suspectness of race and gender. In all these cases, the constitutional evil of the underlying prejudice is its systematic degradation of identifications central to free moral personality, including powers to protest injustice in the name and voice of one's human rights. The suspectness of sexual preference should not, for this reason, be considered marginal or peripheral to a responsible interpretation of the American constitutional tradition, but should be a central conservative case

²⁰⁷ See Linde, *supra* note 4, at 41–42.

of the enduring meaning in contemporary circumstances of American constitutional values of human rights and toleration.

The objection to anti-lesbian/gay initiatives, on grounds of their violation of free speech, is strengthened when reinterpreted as an aspect of the constitutionally guaranteed right of conscience. Censorship of speech is certainly one aspect of the constitutional issue. However, the deeper constitutional insult of such initiatives is their expression through public law of sectarian religious discrimination against legitimate forms of conscience that, on grounds of principle, have as much of a claim to equal protection as any other form of conscience. The emphasis of the free speech argument on lesbian and gay identity may, in light of the alternative perspective proposed here, reasonably be interpreted to mean to make this point exactly.

Finally, the political participation objection to these initiatives, however dubious as a general argument of either constitutional or political theory, may reasonably be understood to make a narrower point about the unconstitutional entrenchment of rights-denying forms of prejudice. *Hunter v. Erickson*,²⁰⁸ on my interpretation, makes this point exactly: issues of discrimination on grounds of race, religion, and ancestry may not be removed selectively from the political process. Colorado Amendment Two violates this principle a fortiori: it selectively removes from the ordinary political process not all grounds for discrimination on grounds of conscience, but discrimination on the basis of one specific form of conscience, namely, discrimination on grounds of lesbian and gay identity. The state may be no more complicitous with the construction of the rights-denying dehumanization of lesbians and gays than it may be with that of Jews, African-Americans, or women.

One might be struck by the paradox that these arguments, invariably clarified or strengthened by the alternative perspective here proposed, make no reference to it when, on examination, their legitimacy expressly or implicitly assumes this perspective. The paradox is all the more puzzling because these arguments much more closely capture and express the reality of the situation: the emancipation of self-respecting lesbian and gay conscience voicing its claims to basic justice and the aggressively reactionary religious war on these claims to respecting such a form of conscience, let alone its claims to justice. Lesbians and gay men should, on this reactionary view, return supinely to the closet of their cultural invisibility and silence, surrendering their minds and hearts to the measure of the dehumanized stereotype that has historically shrunk and degraded them.

²⁰⁸ 393 U.S. 385 (1969).

But, proponents of basically sound constitutional arguments are understandably as much under the sway of dominant, uncritical majoritarian assumptions as their opponents. Advocates of the rights of lesbian and gay persons may assume uncritically that their understanding of these rights has been and is so opposed to and by dominant religious understandings that these rights cannot, in their nature, be protected by guarantees that include protections of religious conscience. Such assumptions rest on a startling non sequitur: if arguments of one's opponents depend on (even admittedly bad or sectarian) religion or conscience, one's own arguments cannot depend on anything remotely of that sort, as if sectarian conscience must be the measure of all arguments of conscience (including, paradoxically, one's own). But, such erroneous assumptions not only underestimate the capacity of traditionally religious people to rethink and recast their own traditions on grounds of justice, but also fail to take seriously what is fundamental to all serious advocacy for the basic rights of lesbian and gay persons, namely, that the grounds for claims to lesbian and gay identity are rooted in the most basic rights owed all persons under American constitutionalism. We no more can permit sectarians to define for us the meaning of constitutional values like conscience and toleration than we can permit them to define the meaning of our lives and struggles as free people.

The emphasis placed in this Article on the right to conscience may have been resisted for another, more weighty reason. Most serious discussion of the suspectness of sexual preference has, as we have seen, assumed that sexual preference must, to qualify as a suspect classification, be pressed into the Procrustean model of immutability, salience, and powerlessness already discussed at length. If this model were the only available approach to qualifying sexual preference as a suspect classification, arguments based on the right to conscience reasonably might be correspondingly de-emphasized because these arguments place weight on choice and identification in ways that are in tension with immutability and the like. But, as already argued, the emphasis on immutability, salience, and powerlessness is an interpretive mistake both as a matter of the constitutional principle of suspect classification analysis in general and the suspectness of sexual preference in particular. All compelling arguments for suspect classification status turn on the irrationalist burdens placed on identifications central to moral personality. Sexual preference is suspect forthrightly because irrationalist burdens today are placed precisely

on the identifications central to the moral personality of lesbian and gay persons, as the analysis of Colorado Amendment Two makes quite clear. We have nothing to lose by abandoning the argument from immutability, salience, and powerlessness, which has certainly achieved little in any event. We need a new approach, one closer to our experience and closer to the reality of our struggle.

The appeal of such an approach is its truth—its truth as a matter of constitutional interpretation, but, equally importantly, its self-respecting truth to ourselves. The shape we give to constitutional arguments is not merely or only or perhaps even primarily whether they will be accepted by a court now, for courts have disappointed us just as presidents have betrayed us and Congress has abused us. The shape we give to constitutional arguments constructs the shape of our moral identity as lesbian and gay persons, and we must responsibly define ourselves in the way most adequate to the common grievances of our diverse lives and experiences.²⁰⁹ The appeal to the right to conscience is, in my judgment, compelling because it most responsibly articulates our common grievances, and thus our demands for self-respect which will not acquiesce again in the silence of the grave assigned us by the dominant religio-cultural orthodoxy that we challenge and must challenge.

If the above reasoning is correct, no argument currently made on behalf of the unconstitutionality of anti-lesbian/gay initiatives need be abandoned. The point is that each of them is strengthened when brought into proper relationship to the argument that has been offered here. We need to make and pursue all these arguments, including arguments not only of high constitutional principle but also of technical procedural detail that, properly interpreted, enable us better to resist the blatant political irrationalism to which these initiatives unconstitutionally pander. Much of American federal and state constitutional law, both procedural and substantive, is understood most plausibly as a way of channeling the political irrationalism the founders called faction, including prominently religious factions, through constitutional demands and structures of public reason that would detoxify its moral poisons.²¹⁰ Accordingly, the sense of the range of substantive and procedural arguments deployed against anti-lesbian/gay initiatives is, in my judgment, clarified by the kind of argument proposed here, focusing, as it does, on the reasonable requirements of constitutional civility that all Americans have the right to demand as the

²⁰⁹ On the need for lesbian and gay scholars to frame their arguments in ways that reflect a reasonable consensus among them, see Halley, *supra* note 62.

²¹⁰ For elaboration of this theme as pervasive in the American founding, see RICHARDS, FOUNDATIONS, *supra* note 17, at 32–39.

condition for politically legitimate government. Correspondingly, we have the right to resist, in whatever ways are available to us, the distortions of these requirements on which proponents of anti-lesbian/gay initiatives invariably depend. The weight we assign to these arguments is best interpreted in light of the argument offered and defended here. In light of this argument, we better understand our arguments as citizens and lawyers as we better define ourselves as persons. Perhaps, in light of this argument, we also will be better understood and even vindicated as members of equal standing of the American constitutional community. That may be our not unreasonable constitutional faith in the integrity of our fellow Americans in a matter as constitutionally essential as the basic human right to conscience.

V. CONCLUSION

Lesbian and gay persons demand personal and moral identity on grounds of justice resting on the inalienable right of conscience that is the right of every American. They have the right to demand on that ground that their difference from the heterosexual majority is no longer a ground for the expression through public law of the constitutionally condemned irrationalism of sectarian identity politics. Identity and difference must be reconstructed on grounds of justice. This has been the struggle for constitutional decency and integrity of African-Americans and women under constitutional law, and it is the same struggle, on grounds of principle, of lesbians and gays.²¹¹

Lesbian and gay persons must reclaim their constitutional tradition from the sectarian bigots who make their narrow minds and cramped souls the measure of human and constitutional rights and responsibilities. By remaking American constitutionalism in their own image, lesbians and gays will, like Martin Luther King's comparable demands,²¹² confirm the moral power of outcasts to lead the nation into a deeper understanding of the meaning of a community not of race or gender or sexual preference, but a moral community of human rights. That is a morally constructive task which touches with ethically prophetic fire not only the lives and struggles of lesbian and gay persons, but also the meaning of life for all Americans. Thus, life is lived not in the vacancies of consumerist distractions or the

²¹¹ For exploration of similar themes, see WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 64-94, 158-97 (1991).

²¹² For a further discussion of the role African-Americans played in constitutional development, see RICHARDS, *CONSCIENCE*, *supra* note 26, at 257-58.

insipidities of mobility without aim, but in distinguished service of the better interpretation of one of the world's most humane constitutional traditions in light of its normative promise and demand of respect for universal human rights under law. One thus dignifies one's life as a lesbian or gay person and as an American. Few lives could be better lived than in such service.

Claims of lesbian and gay identity rest on the most fundamental principles of human rights in our tradition, in particular, the right to conscience, a right central to any sound understanding and conservation of the enduring values of American constitutionalism. Their claims are, in their nature, claims of conscience, of ethical emancipation and empowerment resting on conscientious convictions about how a life is well and responsibly lived. Their opponents aggressively condemn them, essentially in terms of heresy and blasphemy from what, in their view, alone can be the measure of religious truth. A constitutional tradition that knows neither heresy nor blasphemy as constitutionally acceptable forms of law must condemn attempts, like Colorado Amendment Two, to use law to degrade lesbian and gay identity as heresy and blasphemy against true value in living.

The struggle for lesbian and gay identity, on terms of justice, is our contemporary retelling of the oldest narrative of civil liberty, the struggle for the inalienable right of conscience against the manifold forms of subjugation of the moral power to understand, let alone to claim, the rights of one's human nature as a free and responsible person and ethical agent. To fulfill our responsibilities in this struggle, we must understand the stakes, in particular, the central role of the struggle of lesbian and gay identity in both a reasonable and conservative public understanding, in contemporary circumstances, of the struggle against intolerance and the demand that constitutional institutions refuse complicity, on grounds of principle, with its dehumanizing evils.

Colorado Amendment Two and its imitations are unconstitutional because they enlist the state in active complicity with the evil of denying persons the most basic right of their moral personalities—the right to forge conscientiously a mind and heart that demands justice. To crush the human spirit in this way prepares a nation, as twentieth century experience shows so clearly, to accept injustice and to rationalize atrocity. Americans have the responsibilities that go with the good fortune of living under a constitutional order that, properly interpreted, refuses complicity with such a denial of the most basic human rights. We must make clear that what is

at stake is nothing less than the interpretive integrity and conservation of our most basic constitutional principles, which are not suspended when a minority is irrationally despised and degraded. Indeed, the test of our constitutional principles is to stand by them when they are needed, rather than when they are not. We must stand on these principles, and dignify ourselves and our nation by the integrity of our demands for no more, but certainly no less, than respect for the right of conscience due all Americans.

